152 US 284

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. ~~1217.~~ ~~725~~ 344 135

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY, THE WILLAMETTE STEAM MILLS LUMBERING AND MANUFACTURING COMPANY, JULIUS ORDWAY, GEORGE W. WEIDLER, AND AARON KINNEY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

FILED JULY 14, 1890.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1217.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY, THE WILLAMETTE STEAM MILLS LUMBERING AND MANUFACTURING COMPANY, JULIUS ORDWAY, GEORGE W. WEIDLER, AND AARON KINNEY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

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1 In the Supreme Court of the United States.

THE UNITED STATES *vs.* THE NORTHERN PACIFIC RAILROAD COMPANY, The Willamette Steam Mills Lumbering and Manufacturing Company, Julius Ordway, George W. Weidler, and Aaron Kinney.	No. 1477.

Writ of error.

THE UNITED STATES OF AMERICA, *ss.*

The President of the United States of America to the judges of the circuit court of the United States for the district of Oregon, greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before the honorable Lorenzo Sawyer, one of you, between The United States, plaintiff and plaintiff in error, and The Northern Pacific Railroad Company, The Willamette Steam Mills Lumbering and Manufacturing Company, Julius Ordway, George W. Weidler, and Aaron Kinney, defendants and defendants in error, a manifest error hath happened to the great damage of the said plaintiff in error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. eighteen hundred and ninety, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being then and there inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States of America should be done.

Witness the Hon. Melville W. Fuller, Chief-Justice of the Supreme Court of the United States, this June 4, 1890.

[SEAL.] R. H. LAMSON,
Clerk of the Circuit Court of the United States for the District of Oregon.
By R. B. LAMSON,
Deputy Clerk.

(Indorsed:) In the Supreme Court of the United States. The United States vs. The Northern Pacific Railroad Company et al. Writ of error. Filed , 188 . clerk. By , deputy clerk.

12422——1

5 In the circuit court of the United States for the district of Oregon, April term, 1888.

Be it remembered, that on the 19th day of July, 1888, there was duly filed in the circuit court of the United States for the district of Oregon a complaint in words and figures as follows, to wit:

6 In the circuit court of the United States for the district of Oregon.

THE UNITED STATES,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, The Willamette Steam Mills Lumbering and Manufacturing Company, Julius Ordway, George W. Weidler, and Aaron Kinney.

Complaint.

Comes now the plaintiff by Lewis L. McArthur, the attorney thereof for the district of Oregon, and complaining of the above-named defendants, the Northern Pacific Railroad Company, the Willamette Steam Mills Lumbering and Manufacturing Company, Julius Ordway, George W. Weidler, and Aaron Kinney, alleges the following facts constituting its cause of action:

That the defendant, the Northern Pacific Railroad Company, was, on the first day of January, A. D. 1886, ever since has been, and still is, a corporation duly incorporated by and organized in pursuance of an act of the Congress of the United States entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific coast, by the northern route," which act of Congress was approved July 2, 1864.

That at all the times hereinafter mentioned the Willamette Steam Mills Lumbering and Manufacturing Company was, and it still is, a private corporation duly incorporated under the general incorporation laws of the State of Oregon, and carried on, and still carries on, the business of manufacturing lumber at Portland, Oregon.

7 That at all the times hereinafter mentioned, the capital stock of the said Willamette Steam Mills Lumbering and Manufacturing Company was held and owned by Julius Ordway, George W. Weidler, and Aaron Kinney.

That on the first day of March, A. D. 1886, and on divers other days between said day and the first day of December, A. D. 1886, the said defendant, the Northern Pacific Railroad Company, by its servants, agents, and employees, and the said defendant, the Willamette Steam Mills Lumbering and Manufacturing Company, by its servants, agents and employees, and the said defendants, Julius Ordway, George W. Weidler, and Aaron Kinney, all acting together, unlawfully, wilfully, and without the consent or license of the plaintiff, entered upon the northwest quarter of section seven, township eight north, range five west, of the Willamette meridian, in Washington Territory, the same being then and there public lands of the United States of America; and did then and there wrongfully and with intent to dispose of the same cause and procure to be cut and removed

1 In the Supreme Court of the United States.

THE UNITED STATES
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, The Willamette Steam Mills Lumbering and Manufacturing Company, Julius Ordway, George W. Weidler, and Aaron Kinney. } No. 1477.

Writ of error.

THE UNITED STATES OF AMERICA, *ss.*

The President of the United States of America to the judges of the circuit court of the United States for the district of Oregon, greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before the honorable Lorenzo Sawyer, one of you, between The United States, plaintiff and plaintiff in error, and The Northern Pacific Railroad Company, The Willamette Steam Mills Lumbering and Manufacturing Company, Julius Ordway, George W. Weidler, and Aaron Kinney, defendants and defendants in error, a manifest error hath happened to the great damage of the said plaintiff in error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. eighteen hundred and ninety, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being then and there inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States of America should be done.

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[SEAL.]

R. H. LAMSON,
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6 In the circuit court of the United States for the district of Oregon.

THE UNITED STATES
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, The Willamette Steam Mills Lumbering and Manufacturing Company, Julius Ordway, George W. Weidler, and Aaron Kinney.

Complaint.

Comes now the plaintiff by Lewis L. McArthur, the attorney thereof for the district of Oregon, and complaining of the above-named defendants, the Northern Pacific Railroad Company, the Willamette Steam Mills Lumbering and Manufacturing Company, Julius Ordway, George W. Weidler, and Aaron Kinney, alleges the following facts constituting its cause of action:

That the defendant, the Northern Pacific Railroad Company, was, on the first day of January, A. D. 1886, ever since has been, and still is, a corporation duly incorporated by and organized in pursuance of an act of the Congress of the United States entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific coast, by the northern route," which act of Congress was approved July 2, 1864.

That at all the times hereinafter mentioned the Willamette Steam Mills Lumbering and Manufacturing Company was, and it still is, a private corporation duly incorporated under the general incorporation laws of the State of Oregon, and carried on, and still carries on, the business of manufacturing lumber at Portland, Oregon.

7 That at all the times hereinafter mentioned, the capital stock of the said Willamette Steam Mills Lumbering and Manufacturing Company was held and owned by Julius Ordway, George W. Weidler, and Aaron Kinney.

That on the first day of March, A. D. 1886, and on divers other days between said day and the first day of December, A. D. 1886, the said defendant, the Northern Pacific Railroad Company, by its servants, agents, and employees, and the said defendant, the Willamette Steam Mills Lumbering and Manufacturing Company, by its servants, agents and employees, and the said defendants, Julius Ordway, George W. Weidler, and Aaron Kinney, all acting together, unlawfully, wilfully, and without the consent or license of the plaintiff, entered upon the northwest quarter of section seven, township eight north, range five west, of the Willamette meridian, in Washington Territory, the same being then and there public lands of the United States of America; and did then and there wrongfully and with intent to dispose of the same cause and procure to be cut and removed

from said land two hundred and ninety-three thousand five hundred and five feet of timber, board measure, then and there standing, being and growing on said land, which said timber was then and there of the value of one dollar and twenty-five cents per thousand feet, board measure, and of the aggregate value of two hundred and sixty-one and $\frac{88}{100}$ dollars; and did then and there cause and procure said two hundred and ninety-three thousand five hundred and five feet of timber, so cut and removed as aforesaid, to be then and there manufactured into saw logs then and
8 there of the value of one dollar and sixty-five cents per thousand feet, and of the aggregate value of three hundred and forty-five and $\frac{27}{100}$ dollars; and did then and there cause and procure the said two hundred and ninety-three thousand five hundred and five feet, board measure, of saw logs so manufactured as aforesaid to be transported to a point on the Columbia River at or near the town of Cathlamet, in Washington Territory, and there placed in a boom, in which said boom the said saw logs so manufactured as aforesaid from the timber aforesaid were then and there of the value of four dollars and fifty cents per thousand feet, board measure, and of the aggregate value of nine hundred and forty-two and $\frac{75}{100}$ dollars; and did then and there cause and procure the said saw logs so cut and manufactured as aforesaid from the timber aforesaid to be then and there conveyed and transported to Portland, Oregon, and then and there sawed and manufactured into boards and other lumber by the said Willamette Steam Mills Lumbering and Manufacturing Company, Julius Ordway, George W. Weidler, and Aaron Kinney, said boards and other lumber being then and there of the value of ten dollars per thousand feet, and of the aggregate value of two thousand and ninety-five dollars; and the defendants then and there wrongfully, unlawfully, and knowingly did then and there convert all of said boards and other lumber to their own use to the damage of the plaintiff in the sum of two thousand and ninety-five dollars.

Wherefore the plaintiff prays the court for judgment against the defendants for the sum of two thousand and ninety-five dollars, and for the costs and disbursements of this action.

LEWIS L. MCARTHUR,
U. S. Attorney.

9 DISTRICT OF OREGON, *ss:*

I, Lewis L. McArthur, being sworn, upon my oath say that the foregoing complaint is true as I verily believe.

LEWIS L. MCARTHUR.

Subscribed and sworn to before me this 19th day of July, 1888.

R. H. LAMSON,
Clerk,
By WARD S. STEVENS,
Deputy.

(Endorsed:) Filed July 19, 1888. R. H. Lamson, clerk, by Ward S. Stevens, deputy.

15 DISTRICT OF OREGON, *ss:*

I certify that on the 1st day of August, 1888, at Portland, Oregon, Multnomah County, in said district, I duly served the within summons upon the therein-named George W. Weidler, by delivering to him personally a true copy of said summons, duly certified to by me as U. S. marshal, together with a copy of the complaint in the within-entitled suit, duly certified to by the clerk of the U. S. district court for said district.

JOHN MYERS,
United States Marshal.
By W. W. ROBERTS,
Deputy.

16 And afterwards, to wit, on the 10th day of August, 1888, there was duly filed in said court a motion to strike out part of the complaint in words and figures as follows, to wit:

17 In the circuit court of the United States for the district of Oregon.

THE UNITED STATES, PLAINTIFF,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, The Willamette Steam Mills Lumbering and Manufacturing Company, Julius Ordway, Geo. W. Weidler, and Aaron Kinney, defendants.

Come now the said defendants, by their attorneys, and move the court to strike out of the complaint filed herein the following matter, to wit, commencing at the words "that at all the" in the 12th line of the 2nd page and extending to and including the words "Aaron Kinney" in the 16th line of the same page, for the reason that the same is irrelevant.

DOLPH, BELLINGER, MALLORY & SIMON.
Attorneys for Defendants.

(Endorsed:) Filed August 10, 1888, R. H. Lamson, clerk.

18 And afterwards, to wit, on the 10th day of August, 1888, there was duly filed in said court, a stipulation extending time to answer in words and figures as follows, to wit:

19 In the circuit court of the United States for the district of Oregon.

THE UNITED STATES, PLAINTIFF,
vs.
THE NORTHERN PACIFIC RAILROAD COMpany et al., defendants.

It is hereby stipulated between the parties hereto, by their attorneys, that the defendants have to and including the first day of September next to answer the complaint filed in this action.

L. L. MCARTHUR,
U. S. Dist. Attorney.
DOLPH, BELLINGER, MALLORY & SIMON,
Attorneys for Defendants.

(Endorsed:) Filed August 10, 1888. R. H. Lamson, clerk.

from said land two hundred and ninety-three thousand five hundred and five feet of timber, board measure, then and there standing, being and growing on said land, which said timber was then and there of the value of one dollar and twenty-five cents per thousand feet, board measure, and of the aggregate value of two hundred and sixty-one and $\frac{88}{100}$ dollars; and did then and there cause and procure said two hundred and ninety-three thousand five hundred and five feet of timber, so cut and removed as aforesaid, to be then and there manufactured into saw logs then and
8 there of the value of one dollar and sixty-five cents per thousand feet, and of the aggregate value of three hundred and forty-five and $\frac{27}{100}$ dollars; and did then and there cause and procure the said two hundred and ninety-three thousand five hundred and five feet, board measure, of saw logs so manufactured as aforesaid to be transported to a point on the Columbia River at or near the town of Cathlamet, in Washington Territory, and there placed in a boom, in which said boom the said saw logs so manufactured as aforesaid from the timber aforesaid were then and there of the value of four dollars and fifty cents per thousand feet, board measure, and of the aggregate value of nine hundred and forty-two and $\frac{75}{100}$ dollars; and did then and there cause and procure the said saw logs so cut and manufactured as aforesaid from the timber aforesaid to be then and there conveyed and transported to Portland, Oregon, and then and there sawed and manufactured into boards and other lumber by the said Willamette Steam Mills Lumbering and Manufacturing Company, Julius Ordway, George W. Weidler, and Aaron Kinney, said boards and other lumber being then and there of the value of ten dollars per thousand feet, and of the aggregate value of two thousand and ninety-five dollars; and the defendants then and there wrongfully, unlawfully, and knowingly did then and there convert all of said boards and other lumber to their own use to the damage of the plaintiff in the sum of two thousand and ninety-five dollars.

Wherefore the plaintiff prays the court for judgment against the defendants for the sum of two thousand and ninety-five dollars, and for the costs and disbursements of this action.

LEWIS L. MCARTHUR,
U. S. Attorney.

9 DISTRICT OF OREGON, *ss:*

I, Lewis L. McArthur, being sworn, upon my oath say that the foregoing complaint is true as I verily believe.

LEWIS L. MCARTHUR.

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Deputy.

(Endorsed:) Filed July 19, 1888. R. H. Lamson, clerk, by Ward S. Stevens, deputy.

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JOHN MYERS,
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Attorneys for Defendants.

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It is hereby stipulated between the parties hereto, by their attorneys, that the defendants have to and including the first day of September next to answer the complaint filed in this action.

L. L. MCARTHUR,
U. S. Dist. Attorney.
DOLPH, BELLINGER, MALLORY & SIMON,
Attorneys for Defendants.

(Endorsed:) Filed August 10, 1888. R. H. Lamson, clerk.

20 And afterwards, to wit, on Friday, the 5th day of October, 1888' the same being the 4th judicial day of the regular October term of said court. Present: The honorable Matthew P. Deady, United States district judge, presiding. The following proceedings were had in said case, to wit:

21 In the circuit court of the United States for the district of Oregon.

THE UNITED STATES
vs.
THE NORTHERN PACIFIC RAILROAD Company et al. } No. 1477.

OCTOBER 5, 1888.

Now, at this day, comes the plaintiff, by Mr. Lewis L. McArthur, United States attorney, and the defendants by Mr. Rufus Mallory, of counsel, and on motion of said plaintiff it is ordered that this cause be and the same is hereby set for hearing on the motion to strike out part of the complaint, on Friday, October 12, 1888.

22 And afterwards, to wit, on Friday, the 12th day of October, 1888, the same being the 8th judicial day of the regular October term of said court—present, the honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

23 In the circuit court of the United States for the district of Oregon.

THE UNITED STATES
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY *et al.* } No. 1477.

OCTOBER 12, 1888.

Now at this day comes the plaintiff, by Mr. Lewis L. McArthur, United States attorney, and the defendants, by Mr. Rufus Mallory, of counsel, and this cause comes on to be heard upon the motion to strike out part of the complaint, and the court having heard the arguments of counsel, it is Ordered, That said motion be, and the same is hereby, allowed, and that said plaintiff have five days herefrom in which to file an amended complaint.

24 And afterwards, to wit, on the 27th day of October, 1888, there was duly filed in said court an answer of defendant, Northern Pacific Railroad Company, in words and figures as follows, to wit:

25 In the circuit court of the United States for the district of Oregon.

THE UNITED STATES, PLAINTIFF,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, The Willamette Steam Mills Lumbering and Manufacturing Company, Julius Ordway, Geo. W. Weidler, and Aaron Kinney, defendants.

Answer of the Northern Pacific Railroad Company.

Comes now the defendant, The Northern Pacific Railroad Company, by its attorneys, and answering the complaint of the plaintiff filed herein for

standing, being, or growing on said land was of the value of one and twenty-five one-hundredths ($1.25) dollars per thousand feet in the tree,
31 or that the same was of any greater value in the tree than fifty (50) cents per thousand feet, or of any greater aggregate value than one hundred and forty-six and seventy-five one-hundredths ($146.75) dollars, or that when cut into saw-logs they were worth one and sixty-five one-hundredths ($1.65) dollars per thousand feet or any greater sum than one ($1) dollar per thousand feet, or of any greater aggregate value than two hundred and ninety-three and fifty one-hundredths ($293.50) dollars, but this defendant avers and alleges that between the dates in said complaint mentioned, it purchased of and from the Columbia River and Gray's Harbor R. R. Company, a corporation duly incorporated, organized, and existing under the laws of Oregon, about two hundred and ninety-three thousand five hundred and five (293,505) feet of saw-logs at a boom in the Columbia River, which saw-logs, as defendant is informed and believes, were manufactured from trees and timber which grew upon the tract of land in the complaint described, to wit, the NW. ¼ of sec. 7, town. 8 N., R. 5 west, W. M., in Washington Territory, and are the same saw-logs in the complaint mentioned, but defendant denies that said land was then or ever since has been public land of the United States, and avers that at the dates and times in said complaint mentioned said tract of land was owned by Aaron Kinney in fee simple, and was then his property. That said Columbia River and Gray's Harbor R. R. Company purchased the said timber upon said tract of land, manufactured the same into saw-logs, and transported the same to said boom in the Columbia, River in good faith and with the license and consent of the said owner and in the
32 honest belief that the said Aaron Kinney was such owner, and that he had good right and lawful authority to sell said timber and to authorize the said company to cut and remove the same, and without any intent, desire, or purpose to cheat or defraud the United States. And this defendant purchased said saw-logs from said company in the honest belief that said Aaron Kinney was the lawful owner of said tract of land, and honestly believing that as such owner he had the lawful right to sell said timber to said company, and to authorize it to cut and remove the same therefrom, and honestly believing that said timber had been cut and removed therefrom by said company with the license and consent of said owner and not otherwise, defendant denies that the boards or other lumber manufactured from said saw-logs was of the value of ten ($10) dollars per thousand feet, or of any other or greater value than nine ($9) dollars per thousand feet in Portland.

This defendant denies that it did wrongfully or unlawfully, or otherwise than as hereinbefore stated, convert the said alleged boards or other lumber, or any part thereof, to its own use at all, either to the damage of the plaintiff in the sum of two thousand and ninety-five ($2,095) dollars, or any sum or otherwise.

Wherefore defendant prays that it be nence dismissed.

DOLPH, BELLINGER, MALLORY & SIMON,
Att'y's for Def't, Willamette Steam Mills Lumbering and M'f'g Co.

20 And afterwards, to wit, on Friday, the 5th day of October, 1888' the same being the 4th judicial day of the regular October term of said court. Present: The honorable Matthew P. Deady, United States district judge, presiding. The following proceedings were had in said case, to wit:

21 In the circuit court of the United States for the district of Oregon.

THE UNITED STATES
vs.
THE NORTHERN PACIFIC RAILROAD Company et al. } No. 1477.

OCTOBER 5, 1888.

Now, at this day, comes the plaintiff, by Mr. Lewis L. McArthur, United States attorney, and the defendants by Mr. Rufus Mallory, of counsel, and on motion of said plaintiff it is ordered that this cause be and the same is hereby set for hearing on the motion to strike out part of the complaint, on Friday, October 12, 1888.

22 And afterwards, to wit, on Friday, the 12th day of October, 1888, the same being the 8th judicial day of the regular October term of said court—present, the honorable Matthew P. Deady, United States district judge, presiding—the following proceedi ngs were had in said case, to wit:

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vs.
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Now at this day comes the plaintiff, by Mr. Lewis L. McArthur, United States attorney, and the defendants, by Mr. Rufus Mallory, of counsel, and this cause comes on to be heard upon the motion to strike out part of the complaint, and the court having heard the arguments of counsel, it is Ordered, That said motion be, and the same is hereby, allowed, and that said plaintiff have five days herefrom in which to file an amended complaint.

24 And afterwards, to wit, on the 27th day of October, 1888, there was duly filed in said court an answer of defendant, Northern Pacific Railroad Company, in words and figures as follows, to wit:

25 In the circuit court of the United States for the district of Oregon.

THE UNITED STATES, PLAINTIFF,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, The Willamette Steam Mills Lumbering and Manufacturing Company, Julius Ordway, Geo. W. Weidler, and Aaron Kinney, defendants.

Answer of the Northern Pacific Railroad Company.

Comes now the defendant, The Northern Pacific Railroad Company, by its attorneys, and answering the complaint of the plaintiff filed herein for

standing, being, or growing on said land was of the value of one and twenty-five one-hundredths ($1.25) dollars per thousand feet in the tree,
31 or that the same was of any greater value in the tree than fifty (50) cents per thousand feet, or of any greater aggregate value than one hundred and forty-six and seventy-five one-hundredths ($146.75) dollars, or that when cut into saw-logs they were worth one and sixty-five one-hundredths ($1.65) dollars per thousand feet or any greater sum than one ($1) dollar per thousand feet, or of any greater aggregate value than two hundred and ninety-three and fifty one-hundredths ($293.50) dollars, but this defendant avers and alleges that between the dates in said complaint mentioned, it purchased of and from the Columbia River and Gray's Harbor R. R. Company, a corporation duly incorporated, organized, and existing under the laws of Oregon, about two hundred and ninety-three thousand five hundred and five (293,505) feet of saw-logs at a boom in the Columbia River, which saw-logs, as defendant is informed and believes, were manufactured from trees and timber which grew upon the tract of land in the complaint described, to wit, the NW. ¼ of sec. 7, town. 8 N., R. 5 west, W. M., in Washington Territory, and are the same saw-logs in the complaint mentioned, but defendant denies that said land was then or ever since has been public land of the United States, and avers that at the dates and times in said complaint mentioned said tract of land was owned by Aaron Kinney in fee simple, and was then his property. That said Columbia River and Gray's Harbor R. R. Company purchased the said timber upon said tract of land, manufactured the same into saw-logs, and transported the same to said boom in the Columbia River in good faith
32 and with the license and consent of the said owner and in the honest belief that the said Aaron Kinney was such owner, and that he had good right and lawful authority to sell said timber and to authorize the said company to cut and remove the same, and without any intent, desire, or purpose to cheat or defraud the United States. And this defendant purchased said saw-logs from said company in the honest belief that said Aaron Kinney was the lawful owner of said tract of land, and honestly believing that as such owner he had the lawful right to sell said timber to said company, and to authorize it to cut and remove the same therefrom, and honestly believing that said timber had been cut and removed therefrom by said company with the license and consent of said owner and not otherwise, defendant denies that the boards or other lumber manufactured from said saw-logs was of the value of ten ($10) dollars per thousand feet, or of any other or greater value than nine ($9) dollars per thousand feet in Portland.

This defendant denies that it did wrongfully or unlawfully, or otherwise than as hereinbefore stated, convert the said alleged boards or other lumber, or any part thereof, to its own use at all, either to the damage of the plaintiff in the sum of two thousand and ninety-five ($2,095) dollars, or any sum or otherwise.

Wherefore defendant prays that it be nence dismissed.

DOLPH, BELLINGER, MALLORY & SIMON,
Att'y's for Def't, Willamette Steam Mills Lumbering and M'f'g Co.

DISTRICT OF OREGON, *ss:*

I, H. S. Holmes, being duly sworn, depose and say that I am
33 secretary of the Willamette Steam Mills Lumbering and Manufacturing Company, and that the foregoing answer is true as I verily believe.

H. S. HOLMES.

Subscribed and sworn to before me this 27th day of October, 1888.

[SEAL.] VICTOR C. BELLINGER,
Notary Public for Oregon.

(Endorsed:) Filed October 27, 1888. R. H. Lamson, clerk.

34 And afterwards, to wit, on the 27th day of October, 1888, there was duly filed in said court an answer of defendants, Julius Ordway and Geo. W. Weidler, in words and figures as follows, to wit:

35 In the circuit court of the United States for the district of Oregon.

THE UNITED STATES, PLAINTIFF,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, The Willamette Steam Mills Lumbering and Manufacturing Company, Julius Ordway, Geo. W. Weidler, and Aaron Kinney, defendants.

Answer of Julius Ordway and Geo. W. Weidler.

Come now the above defendants, Julius Ordway and Geo. W. Weidler, by their attorneys, and answering the complaint of the plaintiff filed herein, for themselves alone, deny that at all or any of the dates and times in the complaint mentioned the following-described tract of land was public land of the United States, to wit, the northwest one-fourth (NW. ¼) of section seven (7), township eight (8) north, range five (5) west, W. M., in Washington Territory, and deny that at or on any of said dates or times or at any time they, acting together with the Northern Pacific Railroad Company, the Willamette Steam Mills Lumbering and Manufacturing Company, and Aaron Kinney, or with either or any of them, or with either or any of their or either of their agents, servants, or employees, or otherwise, unlawfully or wilfully or otherwise, or without the consent or license of the plaintiff or otherwise, entered upon said tract of land, or did then and there wrongfully or otherwise, or with intent to dispose
36 of the same or otherwise, or at all, cut, or cause or procure to be cut or removed from said land, two hundred and ninety-three thousand five hundred and five (293,505) feet of timber or any timber then standing, being, or growing on said tract of land or otherwise, or did then or there or ever or at all cause or procure said alleged 293,505 feet of timber, or any timber, to be manufactured into saw logs, or did then or there

hundredths ($146.75) dollars; and denies that said timber when cut into saw logs was of the value of one and sixty-five one-hundredths ($1.65) dollars per thousand feet or any greater sum than one ($1.00) dol-
41 lar per thousand feet or of the aggregate value of three hundred and forty-five and twenty-seven one-hundredths ($345.27) dollars, or any greater sum than two hundred and ninety-three and fifty one-hundreths ($293.50) dollars, or that when cut or manufactured into boards at Portland it was worth ten ($10.00) dollars per thousand feet or any greater sum than nine ($9.00) per thousand feet.

And for further and separate defense to said action, and by way of mitigation of any damages which may be proved or shown against him, said defendant alleges that at all the dates and times in said complaint mentioned he was the owner in fee and entitled to the possession of the northwest one-quarter (NW. ¼) of sec. seven (7), township eight (8) north, range five (5) west, W. M., and that the said 293,505 feet of timber alleged in said complaint to have been cut upon and removed from said tract of land was so cut and removed therefrom in good faith, by his license and consent as the owner thereof, and not otherwise. That he was such owner, and had good and lawful right to give such license and consent, and the said timber was cut and removed therefrom in good faith and in the honest belief on the part of the parties cutting and removing the same that he was such owner and had good right and lawful authority to authorize such cutting and removal, and not otherwise.

Wherefore said defendant prays judgment that he be hence dismissed.

DOLPH, BELLINGER, MALLORY & SIMON,
Attys. for Deft. Aaron Kinney.

DISTRICT OF OREGON, *ss:*

I, Aaron Kinney, being duly sworn, depose and say that I am
42 the Aaron Kinney named as defendant in the above-entitled cause, and that the foregoing answer is true as I verily believe.

AARON KINNEY.

Subscribed and sworn to before me this 30th day of August, 1888.

[SEAL.] VICTOR C. BELLINGER,
Notary Public for Oregon.

(Endorsed:) Filed October 27, 1888. R. H. Lamson, clerk.

43 And afterwards, to wit, on Monday, the 7th day of October, 1889, the same being the 1st judicial day of the regular October term of said court, present, the honorable Lorenzo Sawyer, United States circuit judge, presiding, the following proceedings were had in said case, to wit:

44 In the circuit court of the United States for the district of Oregon.

THE UNITED STATES
vs.
THE NORTHERN PACIFIC RAILROAD Company et al. } No. 1477.

OCTOBER 7, 1889.

Now at this day, on motion of Mr. Lewis L. McArthur, United States attorney, it is ordered that this cause be, and the same is hereby, set for trial on Monday, October 21, 1889.

DISTRICT OF OREGON, *ss:*

I, H. S. Holmes, being duly sworn, depose and say that I am
33 secretary of the Willamette Steam Mills Lumbering and Manufacturing Company, and that the foregoing answer is true as I verily believe.

H. S. HOLMES.

Subscribed and sworn to before me this 27th day of October, 1888.

[SEAL.] VICTOR C. BELLINGER,
Notary Public for Oregon.

(Endorsed:) Filed October 27, 1888. R. H. Lamson, clerk.

34 And afterwards, to wit, on the 27th day of October, 1888, there was duly filed in said court an answer of defendants, Julius Ordway and Geo. W. Weidler, in words and figures as follows, to wit:

35 In the circuit court of the United States for the district of Oregon.

THE UNITED STATES, PLAINTIFF,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, The Willamette Steam Mills Lumbering and Manufacturing Company, Julius Ordway, Geo. W. Weidler, and Aaron Kinney, defendants.

Answer of Julius Ordway and Geo. W. Weidler.

Come now the above defendants, Julius Ordway and Geo. W. Weidler, by their attorneys, and answering the complaint of the plaintiff filed herein, for themselves alone, deny that at all or any of the dates and times in the complaint mentioned the following-described tract of land was public land of the United States, to wit, the northwest one-fourth (NW. $\frac{1}{4}$) of section seven (7), township eight (8) north, range five (5) west, W. M., in Washington Territory, and deny that at or on any of said dates or times or at any time they, acting together with the Northern Pacific Railroad Company, the Willamette Steam Mills Lumbering and Manufacturing Company, and Aaron Kinney, or with either or any of them, or with either or any of their or either of their agents, servants, or employees, or otherwise, unlawfully or wilfully or otherwise, or without the consent or license of the plaintiff or otherwise, entered upon said tract of land, or did then and there wrongfully or otherwise, or with intent to dispose
36 of the same or otherwise, or at all, cut, or cause or procure to be cut or removed from said land, two hundred and ninety-three thousand five hundred and five (293,505) feet of timber or any timber then standing, being, or growing on said tract of land or otherwise, or did then or there or ever or at all cause or procure said alleged 293,505 feet of timber, or any timber, to be manufactured into saw logs, or did then or there

hundredths ($146.75) dollars; and denies that said timber when cut into saw logs was of the value of one and sixty-five one-hundredths ($1.65) dollars per thousand feet or any greater sum than one ($1.00) dol-
41 lar per thousand feet or of the aggregate value of three hundred and forty-five and twenty-seven one-hundredths ($345.27) dollars, or any greater sum than two hundred and ninety-three and fifty one-hundreths ($293.50) dollars, or that when cut or manufactured into boards at Portland it was worth ten ($10.00) dollars per thousand feet or any greater sum than nine ($9.00) per thousand feet.

And for further and separate defense to said action, and by way of mitigation of any damages which may be proved or shown against him, said defendant alleges that at all the dates and times in said complaint mentioned he was the owner in fee and entitled to the possession of the northwest one-quarter (NW. ¼) of sec. seven (7), township eight (8) north, range five (5) west, W. M., and that the said 293,505 feet of timber alleged in said complaint to have been cut upon and removed from said tract of land was so cut and removed therefrom in good faith, by his license and consent as the owner thereof, and not otherwise. That he was such owner, and had good and lawful right to give such license and consent, and the said timber was cut and removed therefrom in good faith and in the honest belief on the part of the parties cutting and removing the same that he was such owner and had good right and lawful authority to authorize such cutting and removal, and not otherwise.

Wherefore said defendant prays judgment that he be hence dismissed.

DOLPH, BELLINGER, MALLORY & SIMON,
Attys. for Deft. Aaron Kinney.

DISTRICT OF OREGON, *ss:*

I, Aaron Kinney, being duly sworn, depose and say that I am
42 the Aaron Kinney named as defendant in the above-entitled cause, and that the foregoing answer is true as I verily believe.

AARON KINNEY.

Subscribed and sworn to before me this 30th day of August, 1888.

[SEAL.] VICTOR C. BELLINGER,
Notary Public for Oregon.

(Endorsed:) Filed October 27, 1888. R. H. Lamson, clerk.

43 And afterwards, to wit, on Monday, the 7th day of October, 1889, the same being the 1st judicial day of the regular October term of said court, present, the honorable Lorenzo Sawyer, United States circuit judge, presiding, the following proceedings were had in said case, to wit:

44 In the circuit court of the United States for the district of Oregon.

THE UNITED STATES *vs.* THE NORTHERN PACIFIC RAILROAD COMPANY et al.	No. 1477.

OCTOBER 7, 1889.

Now at this day, on motion of Mr. Lewis L. McArthur, United States attorney, it is ordered that this cause be, and the same is hereby, set for trial on Monday, October 21, 1889.

45 And afterwards, to-wit, on the 9th day of October, 1889, there was duly filed in said court a reply to answer of def't, N. P. R. R. Co., in words and figures as follows, to wit:

46 In the circuit court of the United States for the district of Oregon.

THE UNITED STATES
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, the Willamette Steam Mills Lumbering and Manufacturing Company, Julius Ordway, Geo. W. Weidler, and Aaron Kinney.

Reply to the answer of the Northern Pacific Railroad Company.

Comes now the plaintiff, by Lewis L. McArthur, the attorney thereof for the district of Oregon, and for reply to the answer of the defendant, The Northern Pacific Railroad Company, denies and avers as follows:

Denies that at or during all or any of the times mentioned in the complaint one Aaron Kinney was the owner in fee-simple, or in any other right, or was entitled to the possession of the NW. ¼ of Sec. 7, T. 8 N., R. 5 W., Will. Mer., or any part thereof, and denies that the 293,505 feet of timber cut and removed from said tract of land in the complaint mentioned was cut or removed therefrom in good faith by or with the license or consent of said Aaron Kinney, or that the same was cut in the honest belief, on the part of the parties cutting or removing the same, that said Aaron Kinney was such owner, or that he had a good or lawful right to sell the same or to license or consent to the cutting or removing thereof or any part thereof; and denies that the said cutting and removing of said timber was without intent or design or purpose to cheat or defraud the pl'ff, but avers that the purpose in cutting and removing said tim-

47 ber from said lands was, as the defendant, the Northern Pacific Railroad Company, well knew, to defraud the pl'ff thereof and of the value thereof.

Wherefore the pl'ff prays as in the complaint.

LEWIS L. MCARTHUR,
U. S. Attorney for Oregon.

DISTRICT OF OREGON, *ss:*

I, Lewis L. McArthur, being sworn, upon my oath say that the foregoing reply is true as I verily believe.

L. L. MCARTHUR.

Subscribed and sworn to before me this 9th day of October, A. D. 1889.
R. H. LAMSON, *Clerk,*
By R. B. LAMSON, *Deputy.*

(Endorsed;) Filed October 9, 1889. R. H. Lamson, Clerk.
12422——2

48 And afterwards, to wit, on the 9th day of October, 1889, there was duly filed in said court a reply to answer of def't, W. S. M. L. & Mfg. Co., in words and figures as follows, to wit:

49 In the circuit court of the United States for the district of Oregon.

THE UNITED STATES
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, the Willamette Steam Mills Lumbering and Manufacturing Company, Julius Ordway, Geo. W. Weidler, and Aaron Kinney.

Reply to the answer of the defendant, The Willamette Steam Mills Lumbering and Manufacturing Company.

Comes now the plaintiff, by Lewis L. McArthur, the attorney thereof for the district of Oregon, and for reply to the answer of the defendant, The Willamette Steam Mills Lumbering and Manufacturing Company, denies and avers as follows:

Denies that the defendant The Willamette Steam Mills Lumbering and Manufacturing Company, between the times and dates mentioned in the complaint purchased of or from or obtained of or from the Columbia River and Gray's Harbor Railroad Company, or any company or corporation any part of the saw-logs or timber mentioned in the complaint.

Denies that at the dates or times mentioned in the complaint, or at any time whatsoever the said land in the complaint described, or any part thereof, was owned by Aaron Kinney in fee simple, or in an other right, or that the same or any part thereof was at said dates or times the property of the said Aaron Kinney.

Denies that the Columbia River and Gray's Harbor Railroad Company purchased the timber described in the complaint, or any part thereof, or manufactured the same into saw-logs, or transported the same to any
50 boom in the Columbia River or elsewhere, in good faith or with the license or consent of the alleged owner or any owner of the said timber or land or in the honest belief that said Aaron Kinney was such owner, or that he had a good or any right whatsoever or any lawful authority or any authority whatsoever to sell said timber or any part thereof, or to authorize the said company or any person or persons whatsoever to cut or remove the same, and denies that the said company had no intent or desire or purpose to cheat or defraud the United States.

Denies that the defendant The Willamette Steam Mills Lumbering and Manufacturing Company purchased said saw-logs or any part thereof in the honest belief that the said Aaron Kinney was the lawful owner of said tract of land or any part thereof, and denies that the said defendant honestly, or at all, believed that the said Aaron Kinney as such alleged owner had lawful or any right to sell said or any timber to said or any company or to authorize it or any one to cut or remove the timber or any part thereof from said tract of land.

Denies that the defendant The Willamette Steam Mills Lumbering and Manufacturing Company at any time honestly believed that the said timber had been cut or removed from the said tract of land by the Columbia

River and Gray's Harbor Railroad Company or by any one with the license or consent of the said alleged owner.

Wherefore the pl'ff prays as in the complaint.

LEWIS L. MCARTHUR,
U. S. Att'y.

DISTRICT OF OREGON, *ss:*

I, Lewis L. McArthur, being duly sworn, upon my oath say that
51 the foregoing reply is true, as I verily believe.

LEWIS L. MCARTHUR.

Subscribed and sworn to before me this 9th day of October, 1889.

R. H. LAMSON, *Clerk,*
By R. B. LAMSON, *Deputy.*

(Endorsed:) Filed October 9, 1889. R. H. Lamson, clerk.

52 And afterwards, to wit, on the 9th day of October, 1889, there was duly filed in said court a reply to answer of deft. Julius Ordway and Geo. W. Weidler in words and figures as follows, to wit:

53 In the circuit court of the United States for the district of Oregon.

THE UNITED STATES
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, The Willamette Steam Mills Lumbering and Manufacturing Company, Julius Ordway, Geo. W. Weidler, and Aaron Kinney.

Reply to the answer of Julius Ordway and George W. Weidler.

Comes now the plaintiff, by L. L. McArthur, the attorney thereof for the district of Oregon, and for reply to the answer of the defendants, Julius Ordway and George W. Weidler, denies and avers as follows, to wit:

Denies any knowledge or information sufficient to form a belief as to whether or not the said defendant were ever informed or that they or either of them ever believed that at all the dates or times in the complaint mentioned, or any dates, the tract of land described in the complaint, or any part thereof, was owned by the defendant Aaron Kinney in fee simple or in any other right, or that the same was at said dates or times, or any dates or times, his property.

Denies any knowledge or information sufficient to form a belief as to whether or not the timber mentioned in the complaint, or any part thereof, was cut or removed from the land described in the complaint in good faith or with the license or consent of the said alleged owner, or that the same or any part thereof was cut in the honest belief that the said Aaron Kinney had the legal or other title to said land, or had good or
54 lawful or any authority to sell or otherwise dispose of said timber or give valid license or consent for the same, or any part thereof, to be cut or removed therefrom, or that in such belief the same was so cut or removed.

Wherefore the plff. prays as in the complaint.

LEWIS L. MCARTHUR,
U. S. Attorney.

DISTRICT OF OREGON, *ss:*

I, Lewis L. McArthur, being sworn upon my oath, say that the foregoing reply is true, as I verily believe.

LEWIS L. MCARTHUR.

Subscribed and sworn to before me this 9th day of October, A. D. 1889.

R. H. LAMSON, *Clerk,*
By R. B. LAMSON, *Deputy.*

(Endorsed:) Filed October 9, 1889. R. H. Lamson, Clerk.

55 And afterwards, to wit, on the 9th day of October, 1889, there was duly filed in said court a reply to answer of deft. Aaron Kinney in words and figures as follows, to wit:

56 In the circuit court of the United States for the district of Oregon.

THE UNITED STATES *vs.* THE NORTHERN PACIFIC RAILROAD COMPANY, The Willamette Steam Mills Lumbering and Manufacturing Company, Julius Ordway, Geo. W. Weidler, and Aaron Kinney.	No. 1477.

Reply to the answer of Aaron Kinney, deft.

Comes now the plaintiff by L. L. McArthur, the attorney thereof for the district of Oregon, and for reply to the answer of the defendant, Aaron Kinney, denies and avers as follows:

Denies that during all or any of the times or at all or any of the dates mentioned in the complaint or at any time or date whatsoever the defendant, Aaron Kinney, owned the northwest quarter of section seven in township eight north, range five west, of the Willamette meridian or any part thereof, in fee simple or at all, and denies that the said tract of land was then or there or at any time the property of said defendant, Aaron Kinney.

Denies that during all or any of the times or at all or any of the dates mentioned in the complaint, or at any time or date whatsoever, the defendant, Aaron Kinney, was the owner in fee or at all or was entitled to the possession of the tract of land described in the complaint or any part thereof.

Denies that the timber cut or removed therefrom as alleged in the complaint was cut or removed therefrom in good faith or by the said defendant's license or consent as the owner thereof.

57 Denies that said defendant was at any time the owner thereof, and denies that he ever at any time had good or lawful right to give such or any license or consent to anyone whomsoever, and denies that the said timber was cut or removed from said land in good faith or in the honest belief on the part of the parties or any thereof cutting or removing the same that he, the said defendant, was such owner or had good right or lawful authority to authorize such or any cutting or removal.

Wherefore the plff. prays as in the complaint.

LEWIS L. MCARTHUR,
U. S. Atty.

DISTRICT OF OREGON, *ss:*

I, Lewis L. McArthur, being sworn upon my oath, say that the foregoing reply is true as I verily believe.

LEWIS L. MCARTHUR.

Subscribed and sworn to before me this 9th day of October, A. D. 1889.

R. H. LAMSON, *Clerk.*
By R. B. LAMSON, *Deputy.*

(Endorsed:) Filed October 9, 1889. R. H. Lamson, clerk.

58 And afterwards, to wit, on the 21st day of October, 1889, there was duly filed in said court a stipulation, in words and figures as follows, to wit:

59 In the circuit court of the United States for the district of Oregon.

THE UNITED STATES, PLAINTIFF,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, The Willamette Steam Mills Lumbering and Manufacturing Co., Geo. W. Weidler, Julius Ordway, and Aaron Kinney, defendants.

It is hereby stipulated and agreed by and between the parties to this action by their attorneys that the jury heretofore empanelled and sworn in this cause shall be discharged and that this cause may be tried by the court without the intervention of a jury, a trial by jury being hereby waived.

LEWIS L. MCARTHUR,
U. S. Dist. Atty. for Oregon for the Pl'ff.
DOLPH, BELLINGER, MALLORY & SIMON,
Attorneys for the Defendants.

(Endorsed). Filed October 21, 1889. R. H. Lamson, clerk.

60 And afterwards, to wit, on the 2d day of December, 1889, there was duly filed in said court a stipulation as to certain facts, in words and figures as follows, to-wit:

61 In the circuit court of the United States for the district of Oregon.

THE UNITED STATES, PLAINTIFF,
vs.
THE NORTHERN PACIFIC RAILWAY COMPANY, The Willamette Steam Mills Lumbering and Manufacturing Company, Geo. W. Weidler, Julius Ordway, and Aaron Kinney, defendants.

Stipulation.

It is hereby stipulated and agreed by and between the parties to this action, by their respective attorneys, that the following are facts in this case:

1st. That on the 6th day of March, 1865, Josiah Perham, as president of the Northern Pacific Railroad Company, forwarded to the Secretary of

the Interior a map of general route showing the preliminary location of the company's railroad line from a point on Lake Superior to a point on Puget Sound, saying, in a letter accompanying said map, "Under authority from the board of directors of the Northern Pacific Railroad Company I have designated on the accompanying map, in red ink, the general line of their railroad from a point on Lake Superior, in the State of Wisconsin, to a point on Puget Sound, in Washington Territory, via the Columbia River, adopted by said company as the line of its railroad, subject only to such variations as may be found necessary after more specific surveys," and asking that the lands granted to the company be with-
62 drawn from sale in conformity with law. No action was taken by the Interior Department upon this map or the request accompanying it. That the line of the route indicated was wholly north of 45th degree of north latitude and within the territory of the United States.

2nd. On the 13th day of August, 1870, the same company filed with the Secretary of the Interior and the Commissioner of the General Land Office another map showing the general route of its main line from a point on Puget Sound, following almost identically the same route as that indicated on the map filed by the company on the 6th day of March, 1865, and on the day of the filing of the last-named map, to wit, August 13th, 1870, twenty sections of land per mile on each side of the line indicated by said map were withdrawn from sale for the benefit of the said company, and on the 13th day of September, 1873, the said company duly filed its map of definite location of the line of its said road from Kalama to Tenino, in Washington Territory, a distance of sixty-five miles.

3rd. That no road has been constructed by the said company down the Columbia River.

4th. That the said company, during the year 1871, 1872, and 1873, constructed its line from Kalama, on the Columbia River, in Washington Territory, in a northerly direction to Tenino, a distance of sixty-five miles, forming a portion of a direct line of road, since that time extended and completed to Puget Sound at Tacoma, in said Territory, the western terminus of said road.

5th. That on the 4th day of May, 1870, a corporation existed in the State of Oregon, created under the laws of that State, and known as the Oregon Central Railroad Company.

63 6th. That the only provision of its articles of incorporation conferring the power or right to locate and construct a railroad, is contained in the second paragraph of said articles, which is as follows:

"2nd. The object and business of the corporation shall be to construct and operate a railroad from the city of Portland through the Willamette Valley to the Southern boundary of the State, under the laws of Oregon and the law of Congress recently passed granting lands in aid for such purpose."

7th. That an act of Congress approved May 4th, 1870, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville, in the State of Oregon," provided, among other things, "that for the purpose of aiding in the construction of a railroad and telegraph line from Portland to Astoria, and a suitable point of junction near Forest Grove to the Yamhill River near McMinnville, in the State of Oregon, there is hereby granted to the Ore-

gon Central Railroad Company, now engaged in constructing said road, and to its successors and assigns, a right of way, &c., and certain lands to the amount of ten alternate sections—odd numbers—per mile on each side of said proposed road, not otherwise disposed of, reserved, or held by valid pre-emption or homestead right at the time of the passage of the act."

8th. That during the years 1872 to 1880, a line of road was constructed in pursuance of the authority of said articles of incorporation, from the city of Portland, southward, through the Willamette Valley to-
64 wards the southern boundary of the State, to Corvallis in said valley, a distance of about ninety-seven miles, which said constructed line of road passes through McMinnville and near Forest Grove, but no part of any line from a point of junction near Forest Grove to the Yamhill River or elsewhere, has ever been constructed by said company, and that Astoria is distant from Portland in a northwesterly direction, about seventy-five miles.

9th. That the said Oregon Central Railroad Company filed an acceptance of the said grant as required by said act of May 4th, 1870, and filed a map of definite location of a proposed line of road from Astoria to Castor Creek, near Forest Grove, on the 31st day of January, 1872, with the Secretary of the Interior.

10th. That the land in suit lies within twenty miles of the line indicated upon the map filed by the Oregon Central Railroad Company with the Secretary of the Interior on the 31st day of January, 1872; is in Washington Territory and north of the 45th degree of latitude; is within forty miles of the line selected by the Northern Pacific Railroad Company for the main line of its road from Lake Superior to Puget Sound by way of the valley of the Columbia River, as indicated upon the map forwarded to the Secretary of the Interior by said company on the 6th day of March, 1865; is within forty miles of the line selected by said company as the main line of its road down the Columbia River to Puget Sound, as indicated upon a map filed with the Secretary of the Interior on the 13th day of August, 1870, hereinbefore mentioned, and is within forty miles of the line of the road as now constructed from Kalama to Tenino.

65 11th. That the said road constructed from Tacoma to Portland runs for about one-half the distance via the valley of the Columbia River to the last-named point, the whole length of said line being 105 miles.

12th. That Congress, by an act approved January 31st, 1885, forfeited the grant made by said act of May 4th, 1870, to the Oregon Central Railroad Company.

13th. That the tract of land in suit (and other tracts) was listed by the Northern Pacific Railroad Company on March 31st, 1885.

14th. That on November 9th, 1885, the General Land Office rejected the said list, including the tract in suit, made by the Northern Pacific Railroad Company.

15th. That on October 29th, 1887, the rejection thereof was considered on appeal by the Department of the Interior, and the decision was sustained.

16th. That after the withdrawal of said land in the interest of the Northern Pacific Railroad Company on the 31st day of August, 1870, the Land Department, as well as the Department of the Interior, refused all appli-

cations for settlement upon lands north of the Columbia River, within the limits of the said grant, to said Northern Pacific Railroad Company to and until after the said 9th day of November, 1885.

17th. That the land in question has been withdrawn from sale by the Land Department, and the Northern Pacific Railroad Company has located, constructed, and was operating its road from Portland to Tacoma at the time it executed its deed to said land to J. B. Montgomery, the grantee of the defendant, Aaron Kinney.

66 18th. That the amount of timber cut from the said tract of land which the defendant, the Willamette Steam Mills Lumbering and Manufacturing Company, manufactured into boards and other lumber, was 293,505 feet, board measure, and that said lumber was worth nine dollars per thousand feet.

The value in the tree and in the log to be gathered from the testimony offered, and hereto annexed.

That on the 2nd day of July, 1870, the Oregon Central Railroad Company, by its board of directors, passed a resolution, accepting the grant of lands provided for by the act of Congress of May 4th, 1870, and assenting to the terms and conditions thereof.

LEWIS L. MCARTHUR,
U. S. Attorney.
DOLPH, BELLINGER, MALLORY & SIMON,
Attorneys for Defendants.

(Endorsed:) Filed December 2, 1889. R. H. Lamson, clerk.

67 And afterwards, to wit, on the 1st day of March, 1890, there was duly filed in said court the findings of the court in words and figures as follows, to wit;

68 In the circuit court of the United States for the district of Oregon.

THE UNITED STATES
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY et al.

MARCH 1, 1890.

A jury having been waived by stipulation in writing, duly filed, and this case having been duly heard by the court on the testimony and stipulation of the parties, Mr. Lewis L. McArthur, U. S. attorney, appearing for plaintiffs, and Mr. Rufus Mallory appearing for defendants, and the court being sufficiently advised, finds the facts to be as stated in the preliminary statement of facts preceding the opinion of the court on file in this cause, and in the stipulation as to the facts in writing, also on file in this case, which statement and stipulation of facts are hereby adopted as the findings of facts in this case.

CONCLUSIONS OF LAW.

1. That upon the filing of the map of general location, and the subsequent completion of the road by the Northern Pacific Railroad Company, as stated in the finding of facts, the title to the land in question indefeasibly vested in the Northern Pacific Railroad Company, which title was by subsequent conveyance fully vested in the defendant, Aaron Kinney.

2. That at the date when the timber was cut upon said lands,
69 the title of the land was fully vested in said defendant, Aaron Kinney, and the plaintiffs were not the owners, and they have not since been the owners, or had any right, title, or interest in said land.

3. The defendants are entitled to judgment.

Let judgment be entered accordingly.

LORENZO SAWYER,
U. S. Circuit Judge, Ninth Judicial Circuit.

(Endorsed:) Filed March 1, 1890. R. H. Lamson, clerk.

70 And afterwards, to wit, on the 1st day of March, 1890, there was duly filed in said court an opinion by the court in words and figures as follows, to wit:

71 United States circuit court, district of Oregon, March 1, 1890.

UNITED STATES
vs.
NORTHERN PACIFIC RAILROAD COMPANY et al.

1. Under the act of Congress of July 2, 1864, granting lands to the Northern Pacific Railway Company to aid in construction of railroad from Lake Superior to Puget Sound, said company was authorized to locate its main line between said points by way of the valley of the Columbia River.

2. Authority given the company by the act of July 2, 1864, to construct a branch by the valley of the Columbia to Portland is not a limitation upon the rights of the company to locate its main line by way of the valley of the Columbia to the sound, if it determines upon the latter as the more eligible railroad route.

3. The selection of this company, as shown by the map filed in the office of the Secretary of the Interior in March, 1865, was a legitimate exercise of its rights under the act of July 2, 1864, and upon the construction of that portion of the road the title to the lands adjacent thereto within the limits of the grant became vested in the company.

4. The line so selected was approved and confirmed by Congress by its resolution of May 31, 1870, and the confirmation relates back to the date of the location and even to the date of the original act, if indeed the title was not perfect before.

5. The act of July 2, 1864, withdrew the lands granted by it upon filing the map or "after the general route shall have been fixed," and the filing its map was such location.

6. No action on the part of the Secretary of the Interior withdrawing the land is required by the act making the grant, but if it had been otherwise his failure to act would not affect the right of the company to the lands granted, it having complied with all the subsequent conditions.

7. The act of May 4, 1870, granting lands to the Oregon Central Railroad Company, did not attach to the land in controversy in this action for the reason, if for no other, that the land was not then public land of the United States not otherwise appropriated. It had been before that date granted to the Northern Pacific Railroad Company.

8. The Northern Pacific Railroad Company conveyed the land described in the complaint to the grantor of K.; one of the defendants, K., sold to the W. L. Mfg. Co., defendant, trees standing thereon. They cut the timber into saw-logs, moved them from the land, and manufactured them into lumber. The United States, claiming the land to be public land, sued the Northern Pacific Railroad Company, K., and the W. L. Mfg. Co. for trespass in removing the timber: held, that the land passed to the Northern Pacific Railroad Company under the act of July 2, 1864, and that the United States has no cause of action.

Before Sawyer, circuit judge.

Louis L. McArthur, U. S. att'y, for plaintiff; Rufus Mallory, for defendants.

STATEMENT OF FACTS.

This is a suit to recover the value of timber cut in 1886 upon the northwest quarter of section seventeen, township eighteen, range four, west of the Willamette meridian, alleged to be public lands. The defense is that the said land was not public land, but was owned in fee simple by one Aaron Kinney, and that the timber was cut by the authority of said Kinney. The ownership of the land is the main issue in the case. The land was claimed by the Northern Pacific Railroad Company to be a portion of the land granted to it by the act of Congress of July 2d, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific coast, by the northern route." (13 Stat., 365.) The lands granted by this act were conveyed to trustees by trust deed in due form to secure bonds issued by the corporation to raise moneys to build the road, with power to sell, bearing date July 1, 1870. The trust deed was made by authority of a joint resolution of Congress approved May 31, 1870 (16 Stat. 378). The trustees conveyed the land in question to James B. Montgomery on September 9, 1870, and by subsequent conveyance whatever title vested in the Northern Pacific Railway Company by said act and joint resolution of Congress, so conveyed to Montgomery, became vested in said defendant, Aaron Kinney, and was in him at the time the timber in question was cut and removed. The timber was cut by authority of Defendant Kinney.

On March 6, 1865, in pursuance of the provisions of the said granting act of July 2, 1864, the president of the Northern Pacific Railroad Company, by direction of the company, forwarded to the Secretary of the Interior a map of the general route of the road from a point on Lake Superior to a point on Puget Sound, and in an accompanying communication said: "Under authority from the board of directors of the Northern Pacific Railroad Company I have designated on the accompanying map, in red ink, the general line of their railroad from a point on Lake Superior, in the State of Wisconsin, to a point on Puget Sound, in Washington Territory, via the Columbia River, adopted by said company as the line of its railroad, subject only to such variations as may be found necessary after more specific surveys," and asking that the lands granted to the company be withdrawn from sale in conformity with law. No action was taken by the Interior Department upon this map or the accompanying request. The line of the route indicated ran in a westerly direction, was wholly

north of the 45th degree of north latitude and within the territory of the United States. On August 13, 1870, the same company filed with the Secretary of the Interior and with the Commissioner of the Land Office another map showing the general route of its main line from a point on Puget Sound, following almost identically the same route as that indicated on the map filed March 6, 1865, and on the day of filing this last map, August 20, 1870, twenty sections of land per mile on each side of the line indicated by said map were withdrawn from sale by the Secretary of the Interior for the benefit of the said company; and on September 13, 1873, said company duly filed its map of definite location of the line of said road from Kalama to Tenino in Washington Territory, a distance of sixty-five miles. In 1871, 1872, and 1873, said railroad company constructed and completed its line of road from Kalama, on the Columbia River in Washington Territory, in a northerly direction to Tenino, a distance of sixty-five miles, forming a portion of a direct line of road since completed, from Portland, Oregon, to Tacoma, on Puget Sound, in said Territory, the western terminus of said road. That portion of the railroad from Portland up the Columbia River to a point where the Northern Pacific Railroad strikes the Columbia has never been constructed. The land in question is within Washington Territory, north of the forty-fifth parallel of north latitude, and is within forty miles of the line selected by the Northern Pacific Railroad Company for the main line of its road from Lake Superior to Puget Sound, by way of the valley of the Columbia River, as indicated on the map forwarded to the Secretary of the Interior by said company on March 6, 1865, and is within forty miles of the line selected as the main line of its road down the Columbia River to Puget Sound, and indicated on said map filed with the Secretary of the Interior on August 13, 1870, and is within forty miles of the line of the road as definitely located and now constructed from Kalama to Tenino and Tacoma, on Puget Sound. The road as constructed from Tacoma to Portland runs for about half its distance by way of the valley of the Columbia River to Portland, the whole length of the said portion of the road being 105 miles. After the withdrawal by the Secretary of the Interior of said lands in the interest of the Northern Pacific Railroad Company, on August 13, 1870, the Land Department at Washington, and the Department of the Interior refused to all applications for settlement north of the Columbia River within the limits of the said grant to the Northern Pacific Railroad Company, until the 9th day of November, 1885. The tract of land in question, together with other lands, was listed by the Northern Pacific Railroad Company on March 31, 1885. On November 9, 1885, the General Land Office rejected the said list, including the land in question, so made by the Northern Pacific Railroad Company, and on October 29, 1887, the Department of the Interior, on appeal, affirmed the rejection. The land in question had been withdrawn from sale by the Land Department and the Northern Pacific Railroad Company had definitely located, constructed, and put in operation its road from Kalama to Tacoma, at the time it executed by its trustees its deed to said land in question to J. B. Montgomery, the grantor of defendant Kinney.

In 1870 there was a corporation existing in Oregon, organized for the purpose, as expressed in its articles of incorporation, of building a railroad from Portland, Or., through the Willamette Valley to the southern bound-

ary of the State. An act of Congress was passed May 4, 1870, granting lands to this company to aid in the construction of a road from a point near Forest Grove on its road to Astoria, this not being a part of the road designated in its articles of incorporation (16 Stat., 94). The Oregon Central Railroad Company filed its acceptance of the grant May 4, 1870, and its map of definite location from Astoria to Castor Creek, near Forest Grove, on January 31, 1872, but it has constructed no part of this line so located. The land in question lies within twenty miles of the line indicated in this map of location, but it is on the north side of the Columbia River, in Washington Territory, now a State. On January 31, 1885, Congress, for failure to build the road, passed an act declaring the said grant to the Oregon Central Railroad Company forfeited (23 Stat., 296).

Sawyer, circuit judge (after stating the facts as set forth): The language of the act authorizing the Northern Pacific Railroad Company to construct a railroad is: "Said corporation is hereby authorized and empowered to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line, with the appurtenances, namely, beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin, thence westerly by the most eligible railroad route as shall be determined by said company, within the territory of the United States, on a line of the 45th degree of latitude to some point on Puget Sound, with a branch via the valley of the Columbia River, to a point at or near Portland, in the State of Oregon, leaving the main trunk at the most suitable place, not more than 300 miles from its western terminus" (16 Stat., 366). The controlling question presented is whether upon reaching the Columbia River, instead of crossing the Cascade Mountain range between the Columbia and Puget Sound, upon finding a more eligible route for its road, the company with its road could follow down the Columbia River Valley to and past Portland, cross over, and go north to Puget Sound, thereby altogether dispensing with its branch to Portland. In my judgment it was fully
72 authorized to do so. The object of Congress was to have a railroad constructed from some point on Lake Superior to some point on Puget Sound, and "upon the most eligible route." No survey had yet been made in such manner as to determine the most desirable route. It was probably supposed that some reasonably practicable route might be found over the mountain range, and in that case it would, probably, be adopted. In that case, also, it would be important to have a connection with Portland, the largest town in the new Northwest. But Congress put no such limitation, as to route, upon the corporation. The language of the act is broad and comprehensive, with but the few limitations expressed, and Congress doubtless expressed the limitations as it intended them to be. It authorizes the corporation to "lay out, locate, and construct * * * a continuous road." It was limited as to its beginning to some point on Lake Superior, but it might be either in Wisconsin or Minnesota, leaving the largest discretion in the company to determine the starting point. Having determined this point, the road was to run "thence westerly by the most eligible railroad route as shall be determined by the company." But it is to be "within the United States" and "on a line north of the 45th degree of latitude to some point on Puget Sound." These were the only limitations put upon the company's authority to locate its road. The corporation was to select the terminus on the sound, as well as the point of

commencement. It was to select the "most eligible railroad route," and the question of eligibility is to "be determined by said company" within the prescribed limits. It would be difficult to confer this authority in more specific, comprehensive terms. The company selected the route which appeared to it to be most eligible, after actual survey. It located its eastern terminus on Lake Superior, then ran its route in a westerly direction to the Columbia River, down that river through Portland to Kalama on the Columbia, then up the valley of another river to a point on Puget Sound. This route, from the point selected on Lake Superior to the point selected on Puget Sound, fulfilled all the requirement of the act of Congress. It ran in a westerly direction from Lake Superior to Puget Sound; it was the route "determined by said company," after thorough examination, to be "the most eligible." It was all "within the the territory of the United States" and was "on a line north of the forty-fifth degree of north latitude," all the way to the "point on Puget Sound." The line selected, therefore, in every particular fulfilled all the requirements and conditions of the statutory grant. It is true, that the selection of the line obviated the necessity of building a branch to Portland, as the main line itself adopted carried the road to Portland. Both objects of Congress were accomplished by one main line, no longer than a main line on the other route, and the branch together, if so long. But the company did not obligate itself to build a branch road to Portland at all. It simply had the right, an option to do so, had it been necessary or desirable. So, as there was water communication between the point where the main line thus selected struck the Columbia River and Portland, and there was less need for haste on this section in the construction of the road, the company found it more advantageous, economical, and speedy to build the road on the two ends from Lake Superior to the Columbia, and from Portland to the sound, those divisions of the road were first built and completed. If the company has failed to construct the division between Portland and the point where the eastern division intersects the Columbia River, it is doubtless because, while it was expending its energies and resources in the construction of these two divisions, eastern and western, another company stepped in and built the road up the Columbia River from Portland to a junction with a division of the road extending from Lake Superior to the Columbia. It seems clear that the company was authorized by the act of Congress to locate its main line as it did. I do not think the authority to construct a branch by the valley of the Columbia to Portland is any limitation of the right of the company to select what it deemed, upon examination, to be the most eligible line for its main road, within the limits expressly designated. It is not a limitation in terms, and it would be a strained construction to infer such a limitation from language so indefinite, where the other provisions of the act are explicit. It simply is a grant of a right to make a branch, also, had it been necessary or desirable. And Congress itself, in its resolution of May 31, 1870, before any location by the Oregon Railroad Company (16 Stat., 378), recognized and approved this main line as having been properly made, after it had been adopted by the company, that resolution "authorizing the Northern Pacific Railroad Company to issue its bonds for the construction of its road and to secure the same by mortgage, and for other purposes." This resolution, in addition to empowering the company to issue bonds and mortgage its lands,

also authorized it "to locate and construct under the provisions, and with the privileges, grants, and duties provided for in its act of incorporation (the said act of 1864), its main road to Puget Sound via the Columbia River, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound." Could there be a plainer recognition and approval of the location of the main line down the Columbia River, as having been properly made, under the provisions of the incorporation act?

This is a legislative construction of the act corresponding to that given to it by the corporation. At all events it confirms the locations, and the confirmation relates back to the date of the location, and even to the date of the act. I feel no hesitation in saying that the location was legally and properly made under the act, and if not, that this resolution confirms it. The grant, then, dates from July 2, 1864. The first map of general location of this portion of the line was filed in the Interior Department in March, 1865. True, the Secretary of the Interior did not, on this occasion, give notice of withdrawal of the lands from pre-emption, sale, etc. But then the statute did not require him to do so. But section 6 provides "that the President of the United States shall cause the lands to be surveyed for forty miles on each side of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad, and the odd sections of land hereby granted shall not be liable to sale, entry, or pre-emption before or after they are surveyed, except by said company, as provided by said act." Thus the act itself withdrew the lands upon the filing of the map, or "after the general route shall have been fixed," which is done by the filing of the map of the route selected. The company, by filing the map, had indicated its line, and the grant, before uncertain, now became certain, and attached to the odd sections of the land within the forty-mile limit. No notice was required to be given by the Secretary. (Butt vs. Northern Pacific Railroad Company, 119 U. S., 55; Denny vs. Dodson, 13 Saw., 84.) But if notice had been provided for, the failure of the Secretary to act would not have affected the rights of the company after it had performed its part. The neglect of the Secretary of the Interior would not impair the company's rights. (Van Wyck vs. Knevals, 106 U. S., 366.) And in this case, as we have seen, "after the general route shall be fixed," the odd sections are not liable to grant to any other party, and the general route was fixed within the meaning of the act on the filing of the map in March, 1865. Another map designating the same line was filed August 13, 1870, upon which, upon the same day, the Secretary of the Interior formally withdrew the lands and issued his notice, and the road was actually constructed and completed on this line in the years 1871–'2 and '3. The title, therefore, became indefeasible, the conditions subsequent as to this part of the line having been fully performed. The grant to the Oregon Central Railroad Company was not made till May 4, 1870, long after the grant to the Northern Pacific Company and the filing of its first map of general location. And it did not file its map of location till January 31, 1872, when for the first time it became definite. This was long after the filing of its second map by the Northern Pacific Company, and long after the passage of the resolution of Congress, of May 31, 1870, recognizing and approving the location of its main route via the Columbia River, and

adjacent to the land in question; and if there was any defect before, the approval operated by relation and took effect from the date of the first act, and the location under it. Besides, the Oregon Central Railroad Company never built this branch of its road, or any part of it, and Congress passed an act declaring its right, whatever it was, forfeited on January 31, 1885.

The grant to the Northern Pacific Railroad Company, therefore, first attached, and there was nothing left upon which the grant to the Oregon Central could operate, either at the date of the filing of its map of location, in January, 1872, or at the date of the granting act, May 4, 1870. It does not appear that the Northern Pacific Railroad Company ever accepted or acted under the joint resolution of April 10, 1869 (16 Stat., 577), and it is understood that it did not, but declined to accept it. There is no presumption without evidence that it did accept any rights under it.

The grant to the Northern Pacific Railroad Company was a grant in præsenti, subject only to be defeated by a failure to perform the conditions subsequent, and by proper proceeding taken on the part of the United States to divest the title and revest it in the Government. But the conditions having been fully complied with so far as this portion of the road is concerned, the title has now become perfect and indefeasible. The title is now, and it was at the time of the cutting of the timber in question, perfect in the defendant Kinney, the holder of the title of the grantee of the Northern Pacific Railroad Company.

As to the last point, I have recently gone over the whole subject, in the case of Francoeur vs. Newhouse, 14 Saw., and 40 Fed. Rep., 648, and cited the numerous authorities on the points decided, to which, and the authorities therein cited, reference is made, without going over the subject again. See also the opinion of Mr. Justice Field in Deamy vs. Dodson, 13 Saw., 69 and 32 Fed. Rep., 899.

The result is that the plaintiff had no title or interest in the land in question at the time of the timber cutting complained of, and there must be judgment for defendants. It is so ordered. Let the findings of facts be in accordance with the statement preceding this opinion, and in the stipulation of the parties as to the facts on file in the case.

SAWYER,
Circuit Judge.

(Endorsed:) Filed March 1, 1890. R. H. Lamson, clerk.

73 And afterwards, to wit, on Saturday, the 1st day of March, 1890, the same being the 96th judicial day of the regular October term of said court; present, the honorable George M. Sabin, United States district judge of Nevada presiding, the following proceedings were had in said case, to wit:

74 In the circuit court of the United States for the district of Oregon.

THE UNITED STATES
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY et al. } No. 1477.

MARCH 1, 1890.

Now at this day comes the defendants by Mr. Rufus Mallory, of counsel, and move the court for judgment on the findings heretofore entered herein.

It is therefore considered that said plaintiff take nothing by this action, and that said defendants go hence without day; and thereupon on motion of Mr. F. P. Mays, United States attorney, it is ordered that said plaintiff have ninety days from this date in which to file a bill of exceptions herein.

75 UNITED STATES OF AMERICA,

District of Oregon, ss:

I, R. H. Lamson, clerk of the circuit court of the United States for the district of Oregon, do hereby certify the foregoing pages, numbered 1 to 74, to be a true and complete transcript of the record and proceedings in a certain cause lately determined in said court, wherein the United States was plaintiff and the Northern Pacific Railroad Company, The Willamette Steam Mills Lumbering and Manufacturing Company, Julius Ordway, George W. Weidler, and Aaron Kinney were defendants, as the same appears from the records and files of said court now in my office and custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court, at Portland, in said district, this June 7, A. D. 1890.

[SEAL.] R. H. LAMSON,
Clerk of said court.
By R. B. LAMSON,
Deputy Clerk.

(Indorsement on cover:) No. 1217. The United States, plaintiff in error, vs. the Northern Pacific Railroad Company, the Willamette Steam Mills Lumbering and Manufacturing Company, Julius Ordway, George W. Weidler, and Aaron Kinney. Oregon C. C. U. S. Filed July 14, 1890.

Office Supreme Court U. S.
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JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

THE UNITED STATES, PLAINTIFF IN error,
vs.
THE NORTHERN PACIFIC RAILROAD Company, The Willamette Steam Mills Lumbering and Manufacturing Company, Julius Ordway, George W. Weidler, and Aaron Kinney.
No. 135.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

THE UNITED STATES, PLAINTIFF IN error,
vs.
THE NORTHERN PACIFIC RAILROAD Company, The Willamette Steam Mills Lumbering and Manufacturing Company, Julius Ordway, George W. Weidler, and Aaron Kinney. } No. 135.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This is a suit for timber trespass, committed in 1886, upon land in Washington, lying northwest of Portland, Oregon, and west of that portion of the line of the North-

ern Pacific Railroad which runs north and south between Portland and Tacoma. The taking of the timber and its value are admitted. The sole question is as to the title to the land. The defendants claim that it is included within the land granted July 2, 1864 (c. 217, 13 Stat., 365), to the Northern Pacific Railroad Company. The United States claim that it is not within that grant.

That act provided—

> SEC. 1. * * * And said corporation is hereby authorized and empowered to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line, with the appurtenances, namely, beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin; thence westerly by the most eligible railroad route, as shall be determined by said company, within the territory of the United States, on a line north of the forty-fifth degree of latitude, to some point on Puget Sound, with a branch, via the valley of the Columbia River, to a point at or near Portland, in the State of Oregon, leaving the main trunk line at the most suitable place, not more than three hundred miles from its western terminus; and is hereby vested with all the powers, priviliges, and immunities necessary to carry into effect the purposes of this act as herein set forth. * * *
>
> SEC. 6. That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or preëmption before or after they are surveyed, except by said company, as provided in this act. * * *

The agreed statement of facts (Record, 21–24) recites (item 10) that the land in question, being part of an odd section—

> Is within 40 miles of the line selected by the Northern Pacific Railroad Company for the main line of its road from Lake Superior to Puget Sound by way of the valley of the Columbia River, as indicated upon the map forwarded to the Secretary of the Interior by said company on the 6th of March, 1865; is within 40 miles of the line selected by said company as the main line of its road down the Columbia River to Puget Sound, as indicated upon a map filed with the Secretary of the Interior on the 13th day of August, 1870.

We claim that the alleged map of general route of March 6, 1865, has no validity, and that no right or title was acquired by its filing

(1) Because it is not upon the route authorized by Congress by the land grant to the Northern Pacific Railroad Company of July 2, 1864.

(2) Because it was not such a map as the law contemplates, but a mere suggestion of alternative routes.

(3) Because it was not accepted or approved by the Interior Department.

ARGUMENT.

I.

The original charter of the Northern Pacific Railroad Company did not authorize it to locate its road to Puget's Sound by way of the Columbia River and Portland, nor to build a road between Portland and Puget Sound. Authority to do so was first given by the joint resolution of April 10, 1869, and the company's title to the lands in question rests solely upon the grant by the joint resolution of May 31, 1870.

The Northern Pacific Railroad Company had no legal authority under the act of July 2, 1864, to designate

a general route by way of the valley of the Columbia River and Portland to Puget Sound. Such a route would be described as running west from Lake Superior to Portland and thence north to Puget Sound, whereas the route designated by Congress was westerly from Lake Superior to Puget Sound, "with a branch via the valley of the Columbia River to a point at or near Portland." This branch would necessarily be south of the main line, and there was no provision for a line from Portland to Puget Sound.

That such was the understanding of Congress, and of the company also, is evident from the action of the company and from the legislation which was secured in 1869 and 1870, authorizing, for the first time, a line between Portland and Puget Sound.

Joint resolution granting right of way for the construction of a railroad from a point at or near Portland, Oregon, to a point west of the Cascade Mountains, in Washington Territory.

Be it resolved, etc., That the Northern Pacific Railroad Company be, and *hereby is, authorized to extend its branch line* from a point at or near Portland, Oregon, to some suitable point on Puget Sound, to be determined by said company, and also to connect the same with its main line west of the Cascade Mountains, in the Territory of Washington; said extension being subject to all the conditions and provisions, and said company in respect thereto being entitled to all the rights and privileges conferred by the act incorporating said company, and all acts additional to and amendatory thereof: *Provided*, That said company shall not be entitled to any subsidy in money, bonds, or additional lands of

the United States in respect to said extension of its branch line as aforesaid, except such lands as may be included in the right of way on the line of such extension as it may be located: *And provided further*, That at least twenty-five miles of said extension shall be constructed before the second day of July, eighteen hundred and seventy-one, and forty miles per year thereafter until the whole of said extension shall be completed.

Approved April 10, 1869 (16 Stat., 57).

A resolution authorizing the Northern Pacific Railroad Company to issue its bonds for the construction of its road and to secure the same by mortgage, and for other purposes.

Resolved, etc., That the Northern Pacific Railroad Company be, and hereby is, authorized to issue its bonds to aid in the construction and equipment of its road, and to secure the same by mortgage on its property and rights of property of all kinds and descriptions, real, personal, and mixed, including its franchise as a corporation; and, as proof and notice of its legal execution and effectual delivery, said mortgage shall be filed and recorded in the office of the Secretary of the Interior; *and also to locate and construct*, under the provisions and with the privileges, grants, and duties provided for in its act of incorporation, *its main road to some point on Puget Sound, via the valley of the Columbia River, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound;* and in the event of there not being in any State or Territory in which said main line or branch may be located, at the time of the final location thereof, the amount of lands per mile granted by Congress to said company, within the limits prescribed by its charter, then said company

shall be entitled, under the directions of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such State or Territory, within ten miles on each side of said road, beyond the limits prescribed in said charter, as will make up such deficiency, on said main line or branch, except mineral and other lands as excepted in the charter of said company of eighteen hundred and sixty-four, to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, preëmpted, or otherwise disposed of subsequent to the passage of the act of July two, eighteen hundred and sixty-four. And that twenty-five miles of said main line *between its western terminus and the city of Portland*, in the State of Oregon, shall be completed by the first day of January, Anno Domini eighteen hundred and seventy-two, and forty miles of the remaining portion thereof each year thereafter until the whole shall be completed between said points: *Provided*, That all lands hereby granted to said company which shall not be sold or disposed of or remain subject to the mortgage by this act authorized, at the expiration of five years after the completion of the entire road, shall be subject to settlement and preëmption like other lands, at a price to be paid to said company not exceeding two dollars and fifty cents per acre; and if the mortgage hereby authorized shall at any time be enforced by foreclosure or other legal proceeding, or the mortgaged lands hereby granted, or any of them, be sold by the trustees to whom such mortgage may be executed, either at its maturity or for any failure or default of said company under the terms thereof, such lands shall be sold at public sale, at places within the States and Territories in which they shall be situate, after not

less than sixty days' previous notice, in single sections or subdivisions thereof, to the highest and best bidder: *Provided further*, That in the construction of the said railroad, American iron or steel only shall be used, the same to be manufactured from American ores exclusively.

SEC. 2. *And be it further resolved*, That Congress may at any time alter or amend this joint resolution, having due regard to the rights of said company and any other parties.

Approved, May 31, 1870. (16 Stat., 378.)

We claim that the land in question, lying, as it does, within 40 miles and west of the line of the road between Portland and Tacoma, was not granted to the company until or except by said joint resolution of May 31, 1870. It will be observed that the joint resolution of April 10, 1869, which was the first authority to the company to locate a line between Portland and Puget Sound, does not make, but on the contrary expressly witholds, any subsidy except the right of way.

In *St. Paul and Pacific Railroad Company* vs. *Northern Pacific Railroad Company* (139 U.S., 1, 13), Mr. Justice Field said:

> When the termini of a railroad are mentioned, for whose construction a grant is made, the extent of which is dependent upon the distance between those points, the road should be constructed upon the most direct and practicable line. No unnecessary deviation from such line would be deemed within the contemplation of the grantor, and would be rejected as not in accordance with the grant.

At the date of the joint resolution of May 31, 1870, neither the company nor the United States recognized any

right in the company to locate its line between Portland and Puget Sound; otherwise the resolution would have been unnecessary. That resolution is the source of the company's title to the lands adjoining the road between Portland and Puget Sound. It has always been so regarded in the Department of the Interior and is assumed in the opinion of Secretary Lamar in *Northern Pacific Railroad Company* v. *McRae* (6 L. D. 400). He refers to the debates in Congress upon the passage of the resolution.

In the course of the debate Senator Howard, of Michigan, said:

> It asks no more at the hands of Congress, as I said before, than what is promised to them in their original charter of 1864; not a single acre, I repeat, with the exception of the new donations upon the line from Portland to Puget Sound, which is authorized by this resolution. *That line from Portland to Puget Sound was not embraced in the original charter.* It was authorized and the right of way given to this company at the last session of Congress (Joint Resolution of April 10, 1869), but simply the right of way, and no lands to enable the company to build it. On that line, and on that alone, are lands required additional to those contemplated in the original charter. (Cong. Globe, 41st Congress, 2d sess., p. 2546.)

Senator Stewart, of Nevada, said (p. 2543):

> There is no grant additional to that contained in the original law, except in the extension of the road on the western end from Portland to Puget Sound.

On the same day Senator Sherman said (p. 2546):

> The first part of this bill gives the company authority to make a mortgage, * * * and it also provides for a *new land grant* from Portland to Puget Sound.

Senator Howard (p. 2569), in answer to Mr. Thurman, stated that this legislation had been urgently asked for before his committee by agents of the Northern Pacific Railroad Company.

Mr. Thurman (p. 2583):

> Does the Senator from Michigan think that if this resolution passes the main line must diverge down the Columbia River at the same point at which the branch would diverge under the original charter?
>
> Mr. HOWARD: I think that would be the construction to be given to the two acts taken together—the charter and the present resolution.
>
> Mr. HOWARD: I now move to strike out, in the fifteenth line, the words *and amendments thereto*, so as to make it sure that this new line, which is to pass from Portland to Puget Sound, will be entitled to the subsidy in lands. (Agreed to.)

In the House of Representatives the measure was discussed May 5, 1870 (Cong. Globe, 42d Cong., 2d sess., p. 3263):

Mr. Wheeler, of New York, chairman of the Railroad Committee, who had the bill in charge, said, in explaining it:

> Second. The company wants to change the route of the main line and branch as defined by the original act of incorporation. It wants now to build its main

line by the way of the valley of the Columbia River instead of over the Cascade Mountains, as intended at the outset.

* * * * *

The route by the valley of the Columbia River is far the more feasible, and can be built in much shorter time and with the means which this bill will enable the company to command. This change takes the road direct to Portland, thus giving it business when it is completed to that point, and enabling it to use the river for the transportation of materials during the progress of construction.

Mr. Wilson, of Minnesota (p. 3266):

This only gives them additional land for an additional piece of road which they now propose to construct from Portland up to Puget Sound.

It would seem from this debate that a leading purpose of the joint resolution of May 31, 1870, as asked for by the company and granted by Congress, was to make a grant of lands for the construction of a railroad from Portland to Puget Sound, and to authorize the location of the western end of the main line of the railroad by way of Portland instead of by a route across the Cascade Mountains, as contemplated by the original grant, and in the light of the facts the claim that the act of July 2, 1864, authorized the company in 1865 to designate the general route of the main line of its road by way of Portland and the valley of the Columbia River to Puget Sound appears to be untenable.

II.

The first proposition is confirmed by the action of the company and by the records of the Interior Department.

If I am right in my claim that the act of July 2, 1864, did not authorize the company to designate a general route by way of the Columbia River and Portland, and that the grant of subsidy lands between Portland and Puget Sound rests solely upon the joint resolution of May 31, 1870, it is immaterial to discuss the so-called map of March 6, 1865, for a map is operative only when based upon a grant from Congress. But I deem it proper to recite the facts concerning that map, as disclosed by the records of the Interior Department, for the purpose of repelling the inferences drawn by the circuit judge from a misunderstanding of the facts, and which affected his construction of the legislation of Congress.

In *Buttz* vs. *The Northern Pacific Railroad* (119 U. S., 55) the court held that when the general route of the road provided for in section 6 of the act of July 2, 1864, was fixed, and information thereof was given to the Land Department by the filing of a map thereof with the Secretary of the Interior, the statute withdrew from sale or preëmption the odd sections to the extent of 40 miles on each side. But the court also declared the conditions that are necessary to accomplish such a result. Mr. Justice Field said (p. 72):

> The general route may be considered as fixed when its general course and direction are determined after an actual examination of the country or from a knowledge of it, and is designated by a line on a map showing the general features of the adjacent country

and the places through or by which it will pass. *The officers of the Land Department are expected to exercise supervision over the matter so as to require good faith on the part of the company in designating the general route, and not to accept an arbitrary and capricious selection* of the line irrespective of the character of the country through which the road is to be constructed. When the general route of the road is *thus fixed in good faith*, and information thereof given to the Land Department by filing the map thereof with the Commissioner of the General Land Office, or the Secretary of the Interior, the law withdraws from sale or preëmption the odd sections, to the extent of forty miles on each side.

What was done by the Northern Pacific Railroad Company in 1865 fails to meet the essential requirements thus laid down for a map of general route. The map was not based upon a survey; it proffered no certificate of an engineer who had examined the country, no affidavit or statement of any other party as to the eligibility of the line marked, and the lines marked lacked that certainty and singleness that is essentially necessary to any line on which a withdrawal of public lands from market could be based, or the tracts of granted land located. The following is the record of what was done.

On March 6, 1865, Josiah Perham, president of the company, addressed the following letter to the Secretary of the Interior:

WASHINGTON, D. C., *March* 6, 1865.

Hon. J. P. UPSHER,
Secretary of the Interior:

SIR: Under authority from the board of directors of the Northern Pacific Railroad Company I have

designated on the accompanying map, in red ink, the general line of their railroad from a point on Lake Superior, in the State of Wisconsin, to a point on Puget Sound, in Washington Territory, via Columbia River, adopted by said company as the line of said railroad, subject only to such variations as may be found necessary after more specific surveys; and I respectfully ask that the same may be filed in the office of the Commissioner of the General Land Office, together with a copy of the charter and organization of said company, and that under your directions the lands granted to said company may be marked and withdrawn from sale, in conformity to law.

I am, respectfully, your obedient servant,

JOSIAH PERHAM,

President Northern Pacific Railroad Company.

(Endorsement on map:) Received from Josiah Perham, president Northern Pacific Railroad, March 6, 1865.

The Secretary of the Interior, on March 9, 1865, transmitted this map to the General Land Office, suggesting "should you perceive no objections," that a withdrawal of lands as indicated in sections 3 and 6 of the law might be ordered.

The Commissioner, under date of June 22, 1865, returned the map to the Secretary and reported adversely as to withdrawing lands, saying that maps of actual survey of the line of road should be filed as a basis for withdrawals and that the map filed was "conjectural." No further action or correspondence was had in regard to the map.

The map filed by Mr. Perham is now found in the General Land Office, having been sent about August, 1872,

to that office together with all other maps then on file in the Department of the Interior relative to land grant railroads for the purpose of thereafter being kept in the first-named office. When examined it is found that it contains no certificate of any kind stating its character or authenticating it otherwise. It is also found that it does not fairly support President Perham's letter. It purports to show by a line in red ink "a practicable railroad line as surveyed by Governor Stevens," based on the route of the Missouri River, and another route, "worthy of examination as a railroad route" (dotted red line), along the Yellowstone River. The two lines diverge at Fargo, Dak., running westward 800 or 900 miles before they coincide again, at a point near Helena, Mont., and along a greater portion of the intervening region they are 100 to 150 miles apart.

The map of a "practicable route," as surveyed by Governor Stevens, is at its western end, by the red line marked in the alternative on two sides of a figure in triangular form—*one side* along the Columbia River from Walla Walla (station marked K) to the north bank of the Columbia opposite Portland (station marked I); a *second side* from the last-mentioned point to a point on Puget Sound (station H), and the *third side* from Puget Sound to Walla Walla (marked in middle also I); then a line from K to L at Lake Pend d'Oreille, after the two alternative routes unite.

The map reads "H, I, K, L, etc., is a practicable route, etc.—that is, a route from Puget Sound to Lake Pend d'Oreille by Walla Walla direct is a practicable route—and the other, H, I, K, L, from Puget Sound, by

way of Portland and Walla Walla, to Lake Pend d'Oreille, is also an equally practicable route, both marked by the *red line*, indicating the two routes from Puget Sound to Walla Walla—one by Portland and one on a route direct between the points "H" and "K."

There is no indication of "branch" and "main line" on the map; both routes are marked with equal plainness and authenticity, apparently as optional for the Secretary of the Interior to fall in with either; but he accepted neither of the routes at that time.

At the eastern end Mr. Perham's route, if such it be, is marked for another alternative. One line ends at Duluth, Minn.; the other 50 miles farther east, in Wisconsin.

This map, in its central and western portions, lacks that single and distinct designation which is necessary to a single line of route. The act of Congress provided for a railroad from Lake Superior to Puget Sound, "with a branch via the valley of the Columbia River to a point at or near Portland, in the State of Oregon, leaving the main trunk line not more than 300 miles from its western terminus." If, therefore, a general route could be designated in the loose manner attempted by Mr. Perham, it would seem, in view of the charter, that the route from Walla Walla direct to Puget Sound must be regarded as the main line of the road meant to be designated by that map.

In the files of the Department of the Interior is the following letter, indorsed as received, December 10, 1866:

NORTHERN PACIFIC RAILROAD,
Boston, December 6, 1866.

SIR: I have the honor to acknowledge the due receipt of your letter of November 27, and now beg

to inclose an estimate of the probable cost of constructing a line of railroad on the route to be occupied by this company.

I greatly regret that I have been unable to furnish you with this estimate at an earlier date, but the absence of all data upon the subject, except those supplied in your own reports, and the extent of the investigations which it has heretofore been necessary to make, has prevented a more immediate compliance with your request.

I am, sir, your obedient servant,

J. GREGORY SMITH,
President Northern Pacific Railroad Company.

Bvt. Brig. Gen. J. H. SIMPSON,
U. S. Army, etc., Washington.

The "estimate" referred to is contained in a communication signed "Edwin F. Johnson, chief engineer, Northern Pacific Railroad Company," dated "Boston, December 6, 1866," addressed to Hon. J. Gregory Smith, president Northern Pacific Railroad Company, and said communication is as follows:

I have prepared, and herewith submit an estimate of the probable cost of the Northern Pacific Railroad and telegraph line as authorized by the company's charter. The data of this estimate, although not derived from actual survey and determination of quantities, is of such a character as to give results not differing very widely perhaps from the actual cost. In preparing it the values of the several items have been stated with reference to the peculiar and extraordinary circumstances under which the work must be performed.

The charter of the Northern Pacific Railroad Company places the eastern terminus of their road at

some point on Lake Superior, in the State of Wisconsin or Minnesota, and the western terminus at some point on Puget Sound, by which is to be understood the tide waters connected with the Straits of Juan de Fuca, south of the international boundary, with the right to carry a branch line from any suitable point within 300 miles of the western terminus to Portland in Oregon.

(A general description of the course of the line from Lake Superior is then given, but we omit the description to the "crossing of the Columbia River near the mouth of the Yakima.")

Continuing:

Following up the valley of the latter [Yakima] to the Snoqualmie Pass in the Cascade range, and descending the western slope of the range to Seattle in the Territory of Washington.

The branch line referred to leaves the main line at the crossing of the Columbia River and follows that river to the terminus at Portland.

(Then follow statements as to the probability that a better route than that on which estimate is given, may exist for a portion of the route east of Washington.)

The writer continues:

The country should also be very carefully examined leading from Pend d'Oreille Lake westerly near Fort Colville to the Okinakane River, and thence across the highlands to a point on the tide water as near as possible to the sea, or to the entrance to the Straits of De Fuca. The matter of placing the main western terminus of the road in near proximity to the sea can not be overrated. Beyond question a great maritime city is yet to arise upon some one of

the unrivalled harbors connected with those straits, and its site should be set for and made the terminus of the railroad.

(Next is given a statement of the character of the materials, roadbed, etc., on which estimates are based, and detailed statements of estimates on nine divisions from eastern terminus).

Continuing:

10. Columbia River to Seattle, 220 miles:	
Grading, etc., as above, at $34,000	$7,480,000
Railway single track, at $18,200	4,004,000
Docking at terminus, extra grading, etc	300,000
	11,784,000
Branch line to Portland.	
11. Columbia River crossing to Portland, 200 miles:	
Grading, etc., as above, at $33,000	6,600,000
Railway, single track, at $18,000	3,600,000
Tunnel, Cape Horn	150,000
Railroad ferry, Columbia River near terminus	450,000
	10,800,000

The report concludes with a recapitulation of the entire cost of the road and telegraph line, and as to the character of equipment estimated for, roadbed, etc.

The original of the following report is also on file in the Interior Department:

St. Albans, Vt., *October* 9, 1867.

Hon. O. H. Browning,
Secretary of the Interior,
Washington, D. C.:

Sir: I have the honor to submit the following report in relation to the Northern Pacific Railroad:

Since the date of the last report several changes have been made in the board of directors of the company.

The board as now constituted is as follows, viz:

(Here follow thirteen names and addresses).

After the reorganization of the board arrangements were perfected for commencing the surveys of the route. Edwin F. Johnson, esq., of Middletown, Conn., was employed as engineer-in-chief, and was instructed to organize several parties and put them into the field at once; two to work from Lake Superior west and two from the Pacific coast east. The two parties on the eastern division were placed under the charge of Gen. Ira S. Spalding, of Utica, N. Y.

They commenced the work at Superior City and at Bayfield, running west. Reports have been made from time to time to the engineer-in-chief, and at last accounts the party had nearly reached the Red River. Explorations of the route have been made as far west as Breckenridge, on the Red River, to which point the surveys are tending. Very satisfactory accounts are given of the country through which the road will pass and a very feasible route is found.

The two parties on the western division were placed under the general charge of Gen. James Tilton, of Wilmington, Del., formerly surveyor-general of Washington Territory.

By the last reports received from time to time thorough explorations had been made of various passes through the Cascade Mountains, and a very feasible route had been found. *The route from Portland, Oregon, had also been examined, and no difficulty found to exist in reaching a point of junction with the main line within the limits prescribed by the charter.*

So far as the reports from the two engineers in charge have been received they show that an extremely

favorable route can be found, and that the leading characteristics of the country, both as to its mineral wealth and its value for agricultural purposes, are such as fully justify the directors in their opinion as to the importance of an early construction of the road. The parties will continue in the field so long as the weather permits.

Detailed reports will soon be made of the work so far as it has progressed, accompanied by proper maps and profiles, to which your Department can at all times have reference if it should be desired.

I am, very respectfully, your obedient servant,

J. GREGORY SMITH,

President Northern Pacific Railroad Company.

The next report found on the files of the Department is as follows:

ST. ALBANS, VT., *October* 24, 1868.

SIR: I have the honor to submit the following report of the transactions of the Northern Pacific Railroad Company for the past year.

In the spring of 1867 the engineer-in-chief, Edwin F. Johnson, esq., was instructed to organize a corps of engineers and commence the surveys of the road. (Then follows a statement as to the organization of two surveying divisions, and the character of the country embraced in the eastern division.)

On the western or Pacific division most satisfactory results have been attained. The doubts which have hitherto been entertained as to the passes through the Cascade or coast range of mountains have been removed, and it is now ascertained that a favorable line can be found through either of three of the

principal passes, and with admissible grades. The surveys have not been continued the past season for lack of a military escort, which it was found impracticable to obtain, and without which surveying parties could not be kept in the field.

A report of the engineer-in-chief showing the progress made by the several parties in the field and the general characteristics of the route surveyed is next set out. We quote the following therefrom concerning the Washington division:

WASHINGTON DIVISION.

The surveys upon this division have thus far been confined to an examination of the Cascade range of highlands, with a view to a knowledge of the practicable passes, and their actual elevation as derived from spirit-level mea-urements.

The entire range has been examined from the Columbia River on the south to the international boundary or the valley of the Skagit, on the north. Within this distance are six passes, the Cowlitz or Packwoods, the Nachess, the Yakima, the Snoqualmie, Cadys, and the Skaget, situated in the order named, the last five of which are north of Mount Ranier, *and all of them available on direct lines leading from the waters of Puget Sound eastwardly to the Columbia at the mouth of the Yakima and above.* The actual elevation of only the most eligible of these passes has as yet been ascertained, viz: The Cowlitz or Packwoods, 2,600 feet above the sea; the Snoqualmie, 3,030 feet; and Cadys, 4,800 feet.

From all of these passes the descent westward to the waters of the sound is more rapid than in the other direction. This descent is the greatest in the

vicinity of the passes, but the measurements made indicate that it will not probably exceed 80 to 90 feet per mile for 12 to 15 miles from each.

The charter of the company contemplates the crossing of the range by the main line of their road, and provides for a branch to Portland, Oregon, which, passing down the valley of the Columbia, avoids the range altogether. No opinion can be given of the pass proper to be situated for the road until surveys have been made crossing the Columbia plain and the position of the line through northern Idaho is determined.

The waters of Puget Sound are remarkable for their extent and depth and freedom from the usual damages to navigation, and the number of good harbors they afford to ocean vessels, extending as they do 150 miles into the heart of the Territory, gives to the company a wide range for a choice in fixing the terminus of their road.

The country in the vicinity of the sound is in general heavily timbered, and the timber, owing to the mildness of the climate, extends far up on the slopes of the mountains.

All through these passes named, at an elevation of 300 feet and over, the trees attain a heighth of 200 to 250 feet. Washington Territory is rapidly adding to its population, and the same is true of Idaho, Montana, and Minnesota. Dakota also bids fair for the future, although at present a portion of it is not so attractive to settlers as the other sections named.

Examinations have been made in the interest of the company of other portions of the route, but they have been explorations merely, and not surveys, and afford no basis for a close estimate of cost or a definite statement of the alignment of the road. They justify, however, fully, as far as they go, all that was set

forth in my report to the company in November last as to the general character of the country from Lake Superior to the Pacific and the character of the road that may be constructed over it.

Respectfully submitted.

EDWIN F. JOHNSON,
Engineer in Chief for Northern Pacific Railroad.

Hon. J. GREGORY SMITH,
President Northern Pacific Railroad Company.

No change has been made in the board of directors the past year, except in the election of Hon. A. S. Divine, of New York, in place of Robert H. Berdell, esq., resigned. The following gentlemen constitute the board, viz, * * *.

Respectfully submitted.

J. GREGORY SMITH,
President Northern Pacific Railroad Company.

Hon. O. H. BROWNING,
Secretary of the Interior, Washington, D. C.

A map which accompanied the report of the chief engineer, referred to by him above as made to the company in November, 1867, is on file in the General Land Office, and shows the main line in the western division running from the Columbia River northwest across the Cascade mountains to Seattle and the branch to Portland, in the valley of the Columbia River. No line is marked to run from Portland north.

Copies of the two foregoing reports, dated October 9, 1867, and October 24, 1868, made by the company and filed in the Department of the Interior, were, in compliance with a resolution of the Senate, adopted March 28, 1870, transmitted to that body by the Secretary of the Interior

on March 30, 1870. (Ex. Doc. No. 75, Senate, Forty-first Congress, second session.)

It is manifest from the history thus disclosed, and it is a fact well known otherwise, that nothing was done towards the construction of the road, until after the passage of the joint resolution of May 31, 1870, in connection with which the foregoing reports were called for by the Senate. After the passage of the joint resolution, viz: on August 13th, 1870, two maps, by Edwin F. Johnson, chief engineer of the Northern Pacific Railroad Company, were filed in the General Land Office. The map through Washington Territory is prefaced thus:

> Map showing the location of the Northern Pacific railroad from its initial point on Puget Sound via valley of the Columbia River to the mouth of the Walla Walla River.
>
> To accompany the certificate of the president and engineer-in-chief of this date.
>
> J. GREGORY SMITH,
> *Pres't Nor. Pac. R. R. Co.*
> EDWIN F. JOHNSON,
> *Engineer-in-chief, N. P. R. R. Co.*
>
> NEW YORK CITY, *July* 26, 1870.
>
> The line of location on this map is indicated by the red line. . . .

With this map a certificate was filed, of which the following are the important portions:

> STATE OF NEW YORK,
> *County of New York, ss:*
>
> NEW YORK CITY, *July* 26, 1870.
>
> Edwin F. Johnson, of the city, county, and State of New York, deposes and says that he is the engin-

eer-in-chief of the Northern Pacific Railroad Company, and that he has been such engineer-in-chief since June, A. D. 1866.

That during the period above named surveys and explorations have been made at various places on the proposed route for said road for determining its proper location, and that in connection with said surveys examinations have been made and information has been collected relative to other portions of said route sufficient to enable the said company to determine approximately, and by reference to appropriate landmarks, the proper position for the line of their said road on those portions with a view to the withdrawal from market or from settlement of the lands granted to the said company on either side of their said road.

The portions of the line of the Northern Pacific Railroad, the proper location of which has thus been ascertained, extend, the first portion, from Lake Superior, in the State of Wisconsin, to the Columbia River, in the Territory of Washington, a distance, as estimated, of fifteen hundred and ten (1,510) miles.

(Here follows a description in detail, which is omitted.)

Another portion of the line of the Northern Pacific Railroad, the proper location of which has been ascertained as above, is situated in Washington Territory, and extends from the international boundary of forty-nine degrees of north latitude southerly along the easterly side of Puget Sound, or of the chain of inland tide-waters connected with the straits of Juan de Fuca to their southern extremity; thence southerly to the Columbia River, and along the eastern and northerly or right bank of that river to a point opposite to the mouth of the Walla Walla River, in said Territory.

This portion is more particularly described as follows, viz:

Commencing at the point where said international boundary of forty-nine degrees of north latitude first meets in its course west the tide waters of the Pacific Ocean.

Thence southeastwardly by the most direct course to the town of Whatcom, on Bellingham Bay, in said Territory, a distance of about *twenty* miles;

Thence southeastwardly on a direct course to the middle point of township number thirty-seven (37), range three (3) east, of the Willamette meridian, a distance of about *six* miles;

Thence southeastwardly on a direct course to the middle point of township No. (30) thirty, range five (5) east, of the Willamette meridian, a distance of about *forty-four* miles;

Thence southwestwardly on a direct course to the middle point of township twenty-seven (27), range four (4) east, of the Willamette meridian, a distance of about *twenty* miles;

Thence due south on a direct course to the middle point of township twenty-one (21), range four (4) east, of the Willamette meridian, a distance of *thirty-six* miles;

Thence southwestwardly on a direct course to the southwest corner of township seventeen (17), range two (2) west, of the Willamette meridian, a distance of about *forty-two* miles;

Thence on a direct course a little east of south to the middle point of the west line of township seven (7), range one (1) west, of the Willamette meridian, on or near the east or right bank of the Columbia River, a distance of about *fifty-two* miles;

Thence following the east or right bank of said river on or near the line of high-water mark of the

same southerly to the site of Fort Vancouver, and thence across said river to Portland, Oregon, and back to Fort Vancouver, a distance of about *thirty-three* miles, to Portland;

Thence from Fort Vancouver, following the right or northerly bank of the said Columbia River on or near the line of high-water mark of the same, eastwardly through the Cascade Range of highlands to a point opposite the mouth of the Walla Walla River, a distance of *one hundred and ninety miles*, more or less; making an estimated distance altogether on this portion of the route of *four hundred and forty-three* miles, and for the aggregate of the two portions as described above a distance of nineteen hundred and sixty-three miles, more or less.

These two portions of the Northern Pacific Railroad above described are fully exhibited on the two maps respectively hereto appended and signed by the undersigned, of even date with this certificate.

EDWIN F. JOHNSON,
Eng'r in Ch'f, N. Pacific R. R. Comp'y.

Sworn and subscribed to this twenty-sixth day of July, A. D. 1870, before me.

[NOTARIAL SEAL.] W. N. GODDARD,
Notary Public, Co. of N. Y.

It is hereby certified that in pursuance of the act of Congress approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific coast, by the northern route," and the several acts amendatory thereto, certain portions of the line or route for said road were so far definitely fixed by resolution of the board of directors of said company on the eighth day of July, A. D. 1870, as to make it the duty of the president of

the said company to request the honorable the Secretary of the Interior to withdraw or withhold from sale and settlement the public lands to which said company are entitled on either side of the lines of their road so described as aforesaid in the certificate of their engineer in chief.

They therefore respectfully ask that their interests may be protected so far as they can be by a withdrawal of lands as above set forth.

Such protection, it is believed, is in strict accordance with the intentions of Congress in granting lands to the company for the construction of their road and will save the company from a serious loss or diminution in the value of the grant consequent upon the delay necessary in making the surveys for filing a location in the usual form.

In testimony whereof the Northern Pacific Railroad Company has caused the same to be signed by its president and has attached hereunto its corporate seal, at the city of New York, this twenty-sixth day of July, A. D. 1870.

J. GREGORY SMITH,
President Nor. Pacific R. R. Co.
[SEAL.] SAM'L WILKESON, *Secretary.*

This map of 1870 is the first map of general route that was filed by the company which fulfils the conditions prescribed by this court for such a map. So far as it provided for a main line between Portland and Puget Sound it was filed and authorized only under the joint resolution of May 31, 1870. It designates a single line, extending from the forty-ninth degree of north latitude southward along the margin of Puget Sound, thence southward to and in the valley of the Cowlitz River to the Columbia River, thence up the Columbia on its northern bank, to

a point opposite the mouth of the Walla Walla River, where the line unites with the line upon the other map of the central and eastern portions of the route.

The Secretary of the Interior refused to recognize the right of the company to skirt along the eastern shore of Puget Sound and confined the withdrawals asked for to lands south of the town of Steilacoom, now Tacoma. His letter is as follows:

DEPARTMENT OF THE INTERIOR,
Washington, D. C., August 13, 1870.

SIR: I received from Edwin F. Johnson, esq., engineer-in-chief, on the 4th instant, two maps showing the general route of the Northern Pacific Railroad, commencing at the mouth of the Montreal River, in Wisconsin, and terminating at the international boundary line in Simiahmoo Bay, in Washington Territory.

The line in said Territory skirts along the entire eastern shore of the waters of Puget Sound. The line as thus run passes many places where deep water is found, and no necessity for terminating it on the boundary line can be perceived. The grant is "to some point on Puget Sound," and does not, as I conceive, recognize any right in the company to cover and control all the waters connected therewith. I have therefore directed the Commissioner to withdraw the odd-numbered sections within 20 miles on each side of the route in Wisconsin and Minnesota, and in Washington Territory only to withdraw such sections south of the town of Steilacoom.

It is noticed that the route passes through several diminished permanent Indian reservations. I do not recognize the right of the company to locate or construct their road through such reservations where

the road can as well be constructed outside of them. They are intended for the homes of the Indians, and can only be encroached upon in case of absolute necessity, from the topographical nature of the country. Upon a proper showing of such a state of facts the Department will authorize the company to negotiate with the Indians for a right of way.

Very respectfully, your ob't servant,

J. D. Cox,
Secretary.

J. Gregory Smith, Esq.,
Pres't Northern Pac. R. R. Co.,
120 *Broadway, New York.*

In Wisconsin and Minnesota the Secretary ordered a withdrawal of lands on the line from the west end of Lake Superior to the western boundary of Minnesota.

The Secretary's recognition of these two portions of the "general route" has been regarded in the General Land Office as determining the same; and in *St. Paul & Pacific Railroad Co.* vs. *Northern Pacific Railroad Co.* (139 U. S. 1, 7), Mr. Justice Field said:

> The general location of the route of the Northern Pacific Railroad was designated in 1869, and a map of it approved by the Secretary of the Interior was filed in the office of the Commissioner of the General Land Office in August, 1870.

I do not deem these references to the records of the Interior Department important, except as repelling the inferences drawn by the circuit judge, and as affecting the construction which the company itself put upon the act of 1864 and upon the resolution of 1870; for, if the company did not, under the act of 1864, have the right to

locate its line to Puget Sound by way of Portland, it is immaterial whether it filed a map, or not, based upon that assumption.

The circuit judge, speaking of the map of 1865, says in his opinion (record, page 29):

> The company selected the route which appeared to it to be the most eligible *after actual survey.*

In the agreed statement there is no recital that the map of 1865 was made upon an actual survey. The extent to which the circuit judge was misled as to the facts is only disclosed fully by these recitals from the records of the Department of the Interior. The circuit judge also speaks of the coincidence between the maps of 1865 and 1870. It is true that at the particular point in question they do coincide, but that fact is purely accidental. The general route of the two maps is quite different.

The court is entitled to examine these records in the land office, being public documents, even if they were not introduced in evidence below, and although they may be construed as contradicting some item of the stipulation made in the circuit court.

United States vs. *Teschmacker*, 22 How., 392, 405.
Romero vs. *United States*, 1 Wall., 721.
Coffee vs. *Groover*, 123 U. S., 1.
Jones vs. *United States*, 137 U. S., 202, 215.
Heath vs. *Wallace*, 138 U. S., 573, 584.
Kirby vs. *Lewis*, 39 Fed. Rep., 66, 77.
Wright vs. *Phillips*, 2 G. Greene (Iowa), 191, 193.

The Northern Pacific Railroad Company listed the land in suit March 31, 1885, but the list was rejected by the Department of the Interior, November 9, 1885. (Agreed Statement, Items 13, 14, and 15, Record 23.)

III.

If the railway company's title to the land depends upon the joint resolution of May 31, 1870, it has none, because the forfeiture of the Oregon Central's grant inured to the United States.

If the subsidy grant of the Northern Pacific Railroad Company between Portland and Puget Sound rests upon the joint resolution of May 31, 1870, it follows that the United States has title to the land in question, and that the judgment of the circuit court should be reversed and the case remanded, with directions to enter judgment in favor of the United States for the agreed value of the timber admitted to have been taken. Because prior to said joint resolution, to wit, on May 4, 1870 (c. 69, 16 Stat., 94) the land was granted to the Oregon Central Railroad Company, which duly perfected its title by filing a map of definite location on January 31, 1872 (Agreed Statement; Items 5, 7, 9, and 10; Record, 22, 23); said grant to the Oregon Central was forfeited by the act of Congress of January 31, 1885 (c. 46, 23 Stat., 296) (Agreed Statement; Item, 12; Record, 23). But this forfeiture did not inure to the Northern Pacific Railroad Company; it took by its grant of May 31, 1870, only lands which, on that day, were public lands grantable by Congress. *United States* v. *Southern Pacific Railroad Company* (146 U. S., 570).

I respectfully submit that the judgment of the circuit court should be reversed, and that judgment should be ordered for the United States, upon the agreed statement, for the value of the timber admitted to have been taken.

LAWRENCE MAXWELL, JR.,
Solicitor-General.

Office Supreme Court U. S.
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JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1893.

NO. 135.

THE UNITED STATES,
Plaintiff in Error,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, THE WILLAMETTE STEAM MILLS LUMBERING AND MANUFACTURING COMPANY, JULIUS ORDWAY GEORGE W. WEIDLER, AND AARON KINNEY,
Defendants in Error.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

BRIEF ON BEHALF OF THE NORTHERN PACIFIC RAILROAD COMPANY.

JAMES McNAUGHT,
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Of Counsel.

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ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

BRIEF ON BEHALF OF THE NORTHERN PACIFIC RAILROAD COMPANY.

The main question involved in this case is one of priority of grant. The United States seeks to recover the value of a large amount of timber cut on a tract of land located in the state of Washington, and within the place limits of the grants made by congress to the Northern Pacific Railroad Company and to the Oregon Central Railroad Company, if any was made to the last named company.

It is claimed by the government that the grant to the Oregon Central is prior to that to

the Northern Pacific, and that said land was granted to the said Oregon Central Railroad Company; and for that reason, and that reason only, excepted from the grant to the Northern Pacific Railroad Company.

The grant to the Oregon Central Railroad Company, if any, was made May 4, 1870. (16 Stat. 94.) The grant to the Northern Pacific Railroad Company was made July 2, 1864. (13 Stat. 365.)

The plaintiff in error contends that the Northern Pacific Company was not authorized to build the main line of its railroad from Lake Superior to Puget Sound via the Columbia river, under the said original act of July 2, 1864, but that it acquired such right under the joint resolution of May 31, 1870. (16 Stat. 378).

The government also contends that said joint resolution conferred upon the Northern Pacific Railroad Company, new grants, powers and privileges as of that date, and that such grants, powers and privileges so conferred are subsequent to the said Oregon Central granting act.

We contend:

First: That the Northern Pacific Railroad Company by the act of congress approved July 2, 1864, (13 Stat. 365), was authorized to construct the main line of its road to Puget Sound, via the Columbia river.

Second: That the joint resolution of May 31, 1870, (16 Stat. 378), was a legislative recognition of the right to so locate the main line, and a

re-location of the existing lines, grants, privileges and powers.

Third: That under the grant by the act of May 4, 1870, the lands granted were not defined except by the constructed road; and the road opposite this land having never been constructed, no title in favor of the grantee attached under that act.

Fourth: That the grant attempted to be made by the act of May 4, 1870, was void for want of a grantee.

AUTHORITY UNDER THE ORIGINAL GRANT.

In section 1 of said act of July 2, 1864, (13 Stat. 365), it is, among other things, enacted as follows, to-wit:

"And said corporation is hereby authorized and empowered to lay out, locate, construct, furnish, maintain, and enjoy, a continuous railroad and telegraph line, with appurtenances, namely: Beginning at a point on Lake Superior, in the state of Minnesota or Wisconsin, thence westerly by the most eligible railroad route, as shall be determined by said company, within the territory of the United States, on a line north of the 45th degree of latitude, to some point on Puget Sound, with a branch, via the valley of the Columbia River, to a point at or near Portland, in the state of Oregon, leaving the main trunk line at the most suitable place not more than 300 miles from its western terminus."

Portland is on the Willamette river, and south of the Columbia river. A railroad constructed down the Columbia river would not reach, or pass through, Portland. The object

of congress was to have a railroad constructed from some point on Lake Superior to some point on Puget Sound, in the territory of the United States, north of lattitude 45, on "*the most eligible route*," to be ascertained and determined the Northern Pacific Railroad Company. The language of the act is broad and comprehensive. It contains but few limitations upon the discretionary power vested in the company of determining the route. The act contains all the limitations upon the discretionary power of the company that congress intended to confer. It authorizes the company to lay out, locate, and construct a railroad from Lake Superior to Puget Sound. It was limited as to its beginning, to "a point on Lake Superior;" and as to its termination, to "some point on Puget Sound," but as to the route to be traversed by the road between such termini, the discretionary power of selecting the most eligible route, was left in the company, unrestricted, save by the limitation that it should be north of the forty-fifth degree of latitude and within the territory of the United States. Congress not having seen fit to prescribe other limitations, the court can insert none.

S. P. R. R. Co. v. *Wiggs*, 43 Fed. Rep. 333, 337.

U. S. v. *B. & M. R. R. R. Co.*, 98 U. S. 334.

In 1865, the company, acting in pursuance of the broad discretionary power vested in it by said granting act, selected the route of its road; and filed with the secretary of the interior a map of such proposed line.* The said map was accompanied by a letter from the president of the company, wich contains the following:

"Under authority from the board of directors of the Northern Pacific Railroad Company, I have designated on the accompanying map, in red ink, the general line of their railroad, from a point on Lake Superior, in the state of Wisconsin, to a point on Puget Sound, in the territory of Washington, via the Columbia River, adopted by said company as the line of its railroad, subject only to such variations as may be found necessary after more specific surveys." Record, p. 22.

And the president's said letter asked, among other things, that the lands granted to the company be withdrawn from sale, in conformity with law. No action was taken by the interior department upon the map or this request accompanying it. The map was not objected to, on account of the location of the route by way of the Columbia River, or on the ground that the road as proposed did not fall within all the limitations and conditions of the granting act. The line as selected fulfilled, in every particular, all the conditions and requirements of the statutory grant, and the said map is evidence of that fact.

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*A copy of this map is, for the covenience of the court, attached hereto as Appendix "B."

The questions of the effect of this map and of the right of the railroad company to locate and construct its railroad down the north bank of the Columbia River, in the then territory, now state, of Washington, has been before the courts in five cases. The opinions of these courts so fully cover the ground that we do not deem it necessary to discuss this proposition further, but content ourselves simply by referring to the decisions.

See: Opinion of Judge Sawyer in this case. Record, pp. 25 to 31, inclusive.

Opinion of Circuit Judge Gilbert in the case of *United States* v. *Oregon & California Ry. Co.*, decided September 8, 1893.

U. S. v. *Brock*, decided by United States District Judge Hanford—opinion not printed. See "Appendix A" for conclusions of law by the judge.

Young v. *N. P. R. R. Co.*, decided by Judge Hanford June 18, 1893. The facts in this case presented precisely the questions presented in the Brock case and in the case at bar. A decree in favor of the railroad company was entered, but no opinion was written.

In the case of *United States* v. *Northern Pacific R. R. Co.*, decided December 29, 1886, by the district court for the second judicial district of the territory of Washington, where the Perham map was not brought to the attention

of the court, but the opinion was based entirely upon the language of the granting act, Judge Hoyt said:

"The *primary object* of the legislation was to secure a railroad to the Sound, and the *secondary*, one to Portland, hence the main line and a branch were authorized. Now it was found by the company that such primary object could be best accomplished by the selection of this Columbia River route for its main line, and that by such selection, not only was such primary object best subserved, but the secondary object above stated fully accomplished without the expense to the government and the company, of the construction of said branch line. I am therefore disposed to think that such location of the main line was authorized by said original act of incorporation."

JOINT RESOLUTION, MAY 31, 1870.

The joint resolution authorizes and empowers the Northern Pacific Railroad Company to "locate and construct under the provisions and with the privileges, grants, and duties provided for in its act of incorporation, its main road to some point on Puget Sound, via the valley of the Columbia river, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound." (16 Stat. 378.)

Judge Sawyer, in this case, and Judge Gilbert, in the Oregon & California case hereinbefore referred to, decided, and we think correctly, that said joint resolution is a legislative recognition of the right of the company to locate and construct its main line down the Col-

umbia river so as to include the land involved in this controversy within its grant. Judge Sawyer, in his opinion in this case, said:

"This resolution, in addition to empowering the company to issue bonds and mortgage its lands, also authorized it to locate and construct, under the provisions, and with the privileges, grants and duties, provided for in its act of incorporation, (the said act of 1864), its main road to Puget Sound via the Columbia River, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound. Could there be a plainer recognition and approval of the location of the main line down the Columbia River, as having been properly made under the provisions of the incorporation act? This is a legislative construction of the act, corresponding to that given it by the corporation—at all events, it confirms the location, and the confirmation relates back to the date of the location, and even to the date of the act I feel no hesitation in saying that the location was legally, and properly made under the act, and find that this resolution confirms it. The grant, then, dates from July 2, 1864. (See Record, pp. 29 and 30.)

Judge Gilbert, in his decision in the Oregon and California case, hereinbefore cited, among other things, says:

"It is contended further that the grant to the Northern Pacific Company, of July 2nd, 1864, is wholly superceded and cancelled by the joint resolution of congress of May 31, 1870—(16 Stat. 378)—and that whatever rights that company has in the public lands it takes from the latter date, having accepted the grant contained in the joint resolution in lieu of the earlier grant. I do not so understand the joint resolution. It begins with a recognition of the incorporation of the company under the prior act. It proceeds to confer upon the company power to mortgage its property. It expressly authorizes the com-

pany to make the change in its line by constructing the main line down the valley of the Columbia river, with power to build a branch line across the Cascade Mountains as indicated in the Perham map. It recognizes the existence and perpetuation of the prior land grant by providing for the substitution of other lands 'in the event of there not being in any state or territory in which said line or branch may be located at the time of the final location thereof, the amount of lands granted by congress to said company within the limits prescribed by its charter.' There is in the joint resolution other recognition of the 'grants and duties' provided for in the act of incorporation, and nothing can be found indicative of a purpose to abrogate the prior act, or substitute a new and independent grant therefor."

No authorities can be found conflicting with these views of Judges Sawyer and Gilbert.

The joint resolution was not only a congressional recognition of the right to locate and construct the line to Puget Sound, via the Columbia valley, under the act of 1864, but it also clearly granted authority to so relocate the existing grants that the grantee could construct not only the main line, via the Columbia valley, but could also construct the branch line via the Cascade mountains. This authority to relocate the lines was made without new words of grant; and wherever the company claims title it must derive that title through the granting words contained in the act of 1864.

The manifest intention and the thought of congress was, not to make a new grant, but to authorize the location and construction of the line by a different route, (if not already so

authorized with the existing "privileges, grants and duties". An analysis of the language of the act makes clear this intention.

The authority to locate and construct under the provisions and with the privileges, grants and duties of the act of incorporation, conferred by the resolution, is not restricted to that portion of the road in the Columbia valley and to Puget Sound, or to that portion between the valley and the sound; but extends to all portions of the line. It is, in terms, to locate and construct the "main line." This road to be so located and constructed is an entirety. The authority conferred is as applicable in Wisconsin, Minnesota, North Dakota, Montana and Idaho as it is in Washington and Oregon. It refers as well to the line in Minnesota from Northern Pacific Junction to the Red River, as it does to the line from Portland to Tacoma. The one is no more constructed under this joint resolution than is the other. If the grants coterminous with the one portion of the line, date only from the resolution, so must the grants coterminous with the other portion. This is the interpretation of the language, giving to the words used their ordinary signification. Any other supposition leads to a labrynth of doubt and uncertainty. If one portion of the grant dates from the act of 1864, and another from the joint resolution, where is the line of division? At the date of the joint resolution neither the main line nor

branch had been located. The main line was afterwards located and constructed to Wallula. The title to the lands granted and earned took effect as of the date of July 2, 1864. Subsequent to the location and construction of this portion of the main line, the branch line was located and constructed from a point of intersection with the main line at Pasco Junction, some sixteen miles *east* of the terminus at Wallula. Did this subsequent location of the branch line have the effect of altering the date of that portion of the grant between the junction and the Wallula terminus of the main line? The route of the road via the Columbia valley and to Puget Sound was fixed in 1870, long before the route of the branch line. Did the reservation and grant thereon take effect under the resolution, or under the act of 1864? If that portion in Minnesota took effect under the act of 1864, and that portion in Western Washington took effect under the resolution, where was the dividing line? If the new grant is to commence at the terminus of the old branch line at a point "at or near Portland," where is that point? These are not idle questions, but practical questions that must be answered in the adjustment of this grant; for if there be two distinct grants, the one antedating the other, the questions of conflicting overlaps must be settled. The moiety principal cannot obtain. To the extent that lands in the overlap pass under one

grant, indemnity must be given under the other.

Did congress intend to create or did it believe it had created, by the joint resolution, a second grant with similar provisions and conditions, but separate and distinct from that created by the original act? The resolution most emphatically answers this in the negative. It treats the road throughout as an undivided whole. It authorizes the issuance of bonds to secure the construction and equipment of "its road;" not of its roads. In case of a deficiency of the quantity granted within the original limits in any state or territory, the road is to receive additional lands in such state or territory, within a farther limit to make good the deficiency. It is not material on what portion of the line the loss has occurred. The right to select as indemnity for losses on the line between Portland and Tacoma, lands on the line between Pasco and the Idaho boundary, is given. Such provision is inconsistent with the theory that two separate and distinct grants are intended. The proviso to the resolution speaks of "all lands *hereby granted* to said company," and again of "the mortgaged lands *hereby granted.*" The lands so described are all the granted lands, those in Minnesota as well as those on the line between Portland and Tacoma, and the phrase "*hereby granted*" forbids a construction, that these lands

pass to the grantee by two separate and distinct grants, the one preceding the resolution by six years.

But conceding, as we think must be done, that the resolution does not contemplate a separate and distinct grant to meet, at some point impossible of determination, the grant made by the act of 1864, and conceding that congress intended a single grant, every portion of which would date from the same period, we must next determine when that period is. Is it July 2, 1864? or did the resolution entirely supersede the original act; and do all of the grants to the Northern Pacific date from May 31, 1870? This last question is so fully answered by Judge Gilbert, in *U. S.* v. *O. & C. R. R. Co.*, *supra*, sustaining the position of the United States, *the party contending to the contrary here*, that but little can be added to what is there said. The joint resolution does not grant a franchise. The franchise authorized to be mortgaged is the franchise existing solely by virtue of the act of 1864, and expiring with the repeal of that act. The resolution refers to the act of 1864, as the "charter" of the company, by which alone that company exists. It describes lands as "granted" by the original act. In fact the resolution recognizes in every sentence the original grants as subsisting. It contains no words of repeal, and does not purport to repeal the original act or forfeit any of the grants made thereby. And

only by a construction most strained, and in deliberate violation of the settled rule that forfeitures are odious and statutes liberally construed to avoid them, could it be interpreted to repeal the original act or forfeit the grants made thereby.

We think it clear that the resolution neither made a new grant, nor superseded nor cancelled the grants conferred by the act of 1864. It simply, as stated, authorized the relocation of the lines with the existing grants. And these grants along the new lines, (if they were new lines) took effect as of the date of the original act, July 2, 1864. This intention is clearly shadowed forth in the phraseology "that the Northern Pacific Railroad Company be, and hereby is, authorized * * * to locate and construct *under the provisions and with the privileges, grants and duties provided for in its act of incorporation*, its main road" etc. This is not equivalent to authority to locate and construct the road with "like" or "similar" or "equivalent" privileges, grants and duties. "Under the provisions and with the privileges, grants and duties," means the identical, not similar or equal, provisions, privileges, grants and duties. And unless a grant relating back to May 31, 1870, and subordinate to a grant made May 4, 1870, is identical with a grant relating back to July 2, 1864, and taking priority over the grant of May 4, 1870, the joint resolution either does not provide

for grants dating from May 31, 1870, or, when congress said "under the provisions and with the privileges, grants and duties provided for" in the act of incorporation, it meant "under different provisions and with different privileges, grants and duties." Where congress has intended simply to make similar or equal grants for a new line, it has used language clearly expressive of such intention. Thus in the act approved July 2, 1864, 13 Stat. 95, it provides that "the said Cedar Rapids and Missouri Railroad Company shall be entitled on such modified line to the same lands and to the same amount of lands per mile, and for such connecting branch, the same amount of land per mile, as originally granted to aid in the construction of its main line, subject to the conditions and forfeiture mentioned in the original grant." The joint resolution of July 12, 1862, 12 Stat. 624, provided that in lieu of a portion of the grant vacated "there shall be granted the alternate sections within the six mile limit of such new branch line of route." The act of March 3, 1871, 16 Stat. 588, provides that the modified line may be located and constructed "with the same proportional grant of lands to be taken in the same manner along said altered lines, as is provided for the present lines by existing laws."

The construction we contend for is supported by all the courts which have passed upon the subject.

Judge Brewer construing this resolution, says:

"The second clause in this resolution, which has reference to the road, authorizes the company to 'locate and construct under the provisions and with the privileges, grants and duties provided for in its act of incorporation, its main road,' etc. This seems to carry an affirmance of all the rights and grants made by the original act, and before any part of this resolution should be held to modify or restrict any such rights and grants the language should be clear."

N. P. R. R. Co. v. *U. S.*, 36 Fed. Rep. 282, 287.

Says Judge Hoyt, in the case of *U. S.* v. *N. P. R. R. Co.*, already referred to:

"The privileges and duties which it had under the original act were to construct a main line railroad from the Lakes to the Sound, in the manner, and by the means therein provided, and also to construct a branch line down the valley of the Columbia. The grants therein named were twenty sections of land per mile on each side of such main or branch line when located in the territories, and half that amount when located in a state, as such lines should thereafter be definitely located and constructed by the company.

"The privileges and duties under the joint resolution were the same; that is, to construct a main line and a branch. This not only appears from this granting clause, but more fully from the entire language and scope of the resolution. There was then no change in the resolution from the terms of the original act in regard to the relations of the company as to rights and duties, the only change being in the location of the lines to which those rights and duties attached.

"Such being the case, it seems to me that even if the word 'grant' had been omitted from the resolution, still the grant of forty sections per mile in the territories, made by the original act, would have attach-

ed to the main and branch lines when definitely located under the new directions, the same as it would if they had been so located under the old. The gist of the change wrought by the resolution was not in the main line or the branch as authorized by the original act, as controlling the building thereof, or the grant therefor, but was simply to change the directions under which the same should be located by the company. If this is reasonably clear without the aid of the word 'grant,' does it not become certain with such aid?"

In *St. P. & P. R. R. Co.* v. *N. P. R. R. Co.*, 139 U. S. 1, the material question at issue was the date of the Northern Pacific act. This court's attention was directed not only to the act of 1864, but also to the resolution of 1870. And it was held that the grant took effect as of the date of July 2, 1864.

In *Bardon* v. *N. P. R. R. Co.*, 145 U. S. 535, it was held that an entry of land existing July 2, 1864, and canceled long prior to May 31, 1870, excluded the land from the grant because the land covered thereby was not public *at the date of the grant.*

If there be but one grant, as we have seen is the case, that grant, it is settled, takes effect by relation as of July 2, 1864.

The interior department in the adjustment of the grant to this railroad company has adopted and followed the construction for which we contend. Where the grant along the branch line, as now located, overlaps the grant

along the main line: and where the grant coterminous with that portion of the line extending between Portland and Tacoma overlaps the grant coterminous with the line via the valley of the Columbia river, and the grant coterminous with the western portion of the branch line at Puget Sound, the department has uniformly adjusted the grants upon the assumption that there was but a single grant: not two grants, one dating from July 2, 1864, and the other from May 31, 1870. In the adjustment under the forfeiture act of September 29, 1890, the same theory has governed. The terminal limits are drawn without reference to priority of grant: and no lands coterminous with one portion of the line are held excluded therefrom because coterminous with another portion located and fixed under an earlier act. No indemnity is allowed for lands coterminous with the constructed line between Portland and Tacoma which were lost because also coterminous with the forfeited line between Wallula and Portland, as would necessarily be the case if one grant dated from May 31, 1870, and the other from July 2, 1864. The moiety principle, founded upon the assumption that there is but one grant, has uniformly governed the department in its action. Upon that principle it has acted in issuing patents to settlers and to the railroad company. By that principle it has been governed in determining the railroad company's right to indemnity. If that construction

is wrong, supposed vested rights of great value and amount will be overthrown and destroyed. Innocent purchasers, relying upon patents from the United States and deeds from the railroad company, will find their titles worthless. If there be two grants, the terminal limits under the forfeiture act must be readjusted. Indemnity selections in lieu of losses along that part of the grant dating from May 31, 1870, selected coterminous with the portions of the grant dating from July 2, 1864, must fail; and the purchasers of such lands must lose their titles. In the face of all these evils, and in the face of the long continued, practical construction by the department, we submit that only the clearest case of error should be sufficient to justify the court in reversing that construction. *

The Pacific Railroad acts present a case in many respects analogous to this. By the 9th section of the act approved July 1, 1862, 12 Stat. 489, the Leavenworth, Pawnee & Western Railroad of Kansas was authorized to construct a railroad and telegraph line from the Missouri river, at the mouth of the Kansas river, on the

* This construction is further supported by the history of the resolution as shown by the debate in Congress. Mr. Corbett in the senate, speaking on the subject, says:

"The change of route for the main and branch lines down the Columbia river is simply a change of the original grant. We authorized them to construct a branch to Portland with the same grants. This simply authorizes them to build their main line down the Columbia, and extend the branch to Puget Sound."

Congressional Globe, 2d Sess. 41st Congress. Part III., p. 573.

south side thereof, so as to connect with the Pacific Railroad of Missouri on the 100th meridian of longitude west from Greenwich, upon the same terms and conditions as provided for the main line of the Union Pacific road. By the act approved July 3, 1866, 14 Stat. 79, this company (then designated the Union Pacific Railway Company, Eastern Division) was authorized to connect its line of railroad and telegraph with the Union Pacific Railroad at a point not more than fifty miles westward from the meridian of Denver in Colorado. Under the original act it could not have constructed its road so far to the west; and if it had done so, could not have earned any lands by reason of that fact. The act of July 3, 1866, contains no words of grant; but the settled construction of the act is that it authorized a new location of an existing grant; and that the title to lands coterminous with that new location, when identified, vested in the company as of the date of the original act, to-wit: July 1, 1862, although under that original act they could not by any construction have been so earned. A review of the acts done by the company under this grant, and of the decisions of the interior department and of the courts thereon, will be very instructive in this case. Under the original act the Leavenworth, Pawnee & Western Railway Company, on July 17, 1862, filed a map showing the general route of its road,

and the lands within the limits of 15 miles on each side thereof were withdrawn from sale. This route extended along the Kansas river from its mouth to the Republican river, and thence along the left bank of the latter to the 100th meridian. After the act of July 3, 1866, the railway company, on July 11, 1866, filed a map in the department of the interior, designating as the general route of its road a line from Fort Riley to the western line of the state, by way of the Smoky Hill river instead of the Republican river. This line lay considerably to the south of the line originally designated. October 3, 1871, Assistant Attorney General Smith held that the company (then known as the Kansas Pacific Company) did not acquire any lands under this act west of Fort Riley, until the passage of the act of March 3, 1869. (See Copp's Public Land Laws, 366.) Under this ruling the lands in conflict between the grant to this company and the grants to the Missouri, Kansas & Texas Company, made by the acts of congress approved March 3, 1863, 12 Stat. 772, July 1, 1864, 13 Stat. 339, and July 26, 1866, 14 Stat. 289, were patented to the Missouri Company. The Kansas Pacific Company having brought suit to quiet its title to the lands within the conflicting limits, this court held, in the case of *M. K. & T. Ry. Co.* v. *K. P. Ry. Co.*, 97 U. S. 491, that as between conflicting railroad

grants, the prior grant carried title; and that the Kansas Pacific Railway Company acquired the title to these lands by virtue of the act of 1862, notwithstanding the change of location, authorized by subsequent acts. Following this decision the interior department has uniformly construed the title to the lands acquired under this act by what is now the Kansas Pacific Railway Company, as vesting as of the date of the original act, to-wit, July 1, 1862.

In the case of *Jones v. Denver Pacific Railway & Telegraph Co.*, decided February 21, 1881, Secretary Schurz, speaking of a tract of land far to the west of the 100th meridian, referring to the decision of the supreme court just cited, says:

"By the act of July 3, 1866, (14 Stat. 79) the Union Pacific Railroad, eastern division (now the Kansas Pacific Railroad Company, and the predecessor of the said Denver Pacific Railroad Company,) was authorized to designate the general route of the road, and to file a map of definite location at any time prior to December 1, 1866. This, the record shows, was done, and on December 25, 1866, the lands along said route were withdrawn for the benefit of said 'eastern division.' Thus the court having ruled that said grant took effect *July 1, 1862*, and as the record shows that the withdrawal was made as aforesaid pursuant to the provisions of said act of July 3, 1866, it necessarily follows that the right of said road could not attach on March 3, 1869."

And see also:

U. P. R'y Co. v. Walker, 11 L. D. 535.

Boyer v. U. P. R'y Co., 10 L. D. 568.

U. P. R'y Co. (Kas. Div.) 11 L. D. 108.

Dudymott v. *K. P. R'y Co.*, 5 Copp's L. O. 69.

In the case of *United States* v. *U. P. R'y Co.*, 148 U. S. 551, this court plainly implied that the title to lands south and west of Denver, and which were earned, and could be earned, only by virtue of the location of the route authorized by the act of 1866, passed by virtue of the act of 1862, and related back to the date of that act. This is all that is necessary for us to contend in this case; and the joint resolution of May 31, 1870, is much clearer in indicating the intention of congress to authorize the relocation of existing grants, if such authority was necessary, than is the act of 1866 construed by the interior department and the courts in the cases to which we have referred.

Our main reliance in this case is upon the points we have already discussed. There remain, however, two other points, to which we wish briefly to call the attention of the court.

UNDER THE ACT OF MAY 4, 1870, THE LANDS GRANTED ARE NOT DEFINED EXCEPT BY THE CONSTRUCTED ROAD, AND NO TITLE VESTS IN THE GRANTEE IN ADVANCE OF CONSTRUCTION.

The first section of the act of May 4, 1870, 16 Stat. 94, granting lands to aid in the construction of the Oregon Central railroad, grants to the company the right of way through the pub-

lic lands of the width of 100 feet on each side of said road, with the right to take from the adjacent public lands materials for constructing said road; and also the necessary lands for depots, stations, side-tracks, and other needful uses in operating the road, not exceeding forty acres at one place; and then provides as follows:

"And also, each alternate section of the public lands, not mineral, excepting coal or iron lands, designated by odd numbers nearest to said road, to the amount of ten such alternate sections per mile, on each side thereof, not otherwise disposed of or reserved or held by valid pre-emption or homestead right at the time of the passage of this act. And in case the quantity of ten full sections per mile cannot be found on each side of said road, within the said limits of twenty miles, other lands designated as aforesaid shall be selected under the direction of the secretary of the interior on either side of any part of said road nearest to and not more than twenty-five miles from the track of said road to make up such deficiency."

The language of this grant is unique, and differs in many respects from every other grant of lands to aid in constructing railroads. In the indemnity clause it is provided that the indemnity lands shall be selected "not more than twenty-five miles from the *track* of said road, to make up such deficiency," and makes the constructed road the call by which to define the indemnity limits. The word "track" means more than a line surveyed upon the surface of the earth and indicated by a plat filed in the interior department. It imports a constructed

road: and since the line of the constructed road furnishes the call for the indemnity limits, it is but reasonable to assume that it furnishes also the call for the granted limits; and such construction must be placed on the act unless there is something in the act plainly requiring a different construction. The language used in the granting clause defines the lands granted as "each alternate section of the public lands, designated by odd numbers, nearest to said *road*, to the amount of ten such alternate sections per mile on each side thereof." The language here used so far from conflicting with the language used in describing the call by which the indemnity limits are located, is strictly consistent therewith. "Nearest to and on each side of the road," giving the words their ordinary signification, would mean nearest to and on each side of the constructed road. In every other act passed by congress granting lands to aid in the construction of railroads, provision is made for definitely fixing the line of the road and it has been uniformly held by the courts, such construction being founded upon the plain letter of the statutes, that the definite fixing of the line of the road requires the filing of a plat thereof in the office of the commissioner of the general land office; and that the line of definite location, as shown on said map, determines the call for the grant in

advance of the constructed road. Under these acts terms similar to those used in the granting clause here, are held to mean lands for so many sections in width on each side of the line of the road as definitely fixed; but in this act, where there is no provision for filing a map of definite location of the line of the road, and where the peculiar language used in the indemnity clause plainly requires the constructed road to furnish the call for the indemnity limits, we submit that the language of the granting clause, to-wit: "ten alternate sections per mile on each side of said *road*" must be held to mean the constructed road, and not the line of definite location. This construction is further confirmed by the provision in the act, differing from every preceding railroad grant, excepting from its provisions, not lands reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights *at the time the line of said road is definitely fixed and a plat thereof filed in the office of the commissioner of the general land office*, but excepting therefrom only lands not otherwise disposed of, or reserved, or held by valid pre-emption or homestead rights, *at the time of the passage of this act.*" The provisions of the second and third sections further confirm this construction.

Section two requires:

"That the commissioner of the general land office shall cause the lands along the line of said road to be

surveyed with all convenient speed; and whenever and as often as said company shall file with the secretary of the interior maps of the survey and location of twenty or more miles of said road, the said secretary shall cause the said granted lands adjacent to and coterminous with such located sections of road to be segregated from the public lands."

In no act passed by congress has there been a provision authorizing the filing of a map of definite location in sections; and while it has been held that it is not necessary that the map of the entire line should be filed, the acts themselves have not in terms provided for divisions of such map; and in this case we think the map referred to, which is to be filed "in sections of twenty or more miles," is the map of the constructed road, and not simply a map of the line of definite location. This construction is confirmed by section three, which provides:

"That whenever and as often as the said company shall complete and equip twenty or more consecutive miles of the said railroad and telegraph, the secretary of the interior shall cause the same to be examined, at the expense of the company, by three commissioners appointed by him; and if they shall report that such completed section is a first-class railroad and telegraph, properly equipped and ready for use, he shall cause patents to be issued to the company for so much of the said granted lands as shall be adjacent to and coterminous with said completed sections."

The provision here that the road shall be examined in sections of twenty or more miles, coupled with the provision in the second section that maps of sections of the road twenty or

more miles in length shall be filed with the interior department, and taken in connection with the fact that no other means are provided by which the secretary of the interior is to be advised when the road is so completed, points strongly to the construction for which we contend, viz.: that the maps to be filed are maps of the constructed road; and that no title to any lands attaches under this grant until such time as the road is constructed and they are thereby defined and segregated from the public lands. If this construction be correct there can be no question as to the title of the Northern Pacific to the land upon which was cut the timber here in controversy, whether the date of the Northern Pacific grant be July 2, 1864, or May 31, 1870. This land is not coterminous with any portion of the constructed road; it is not within the limits of any executive withdrawal made by the department, and unless the title thereto vested in the Oregon Central Railroad Company by the mere fact of filing plats of the proposed line of road, that company never acquired any title or interest in the lands such as would prevent them from passing to the defendant herein.

THE GRANT ATTEMPTED TO BE MADE BY THE ACT OF MAY 4, 1870, WAS VOID FOR WANT OF A GRANTEE.

The Oregon Central Railroad Company was, and is, without any authority under its articles of incorporation to locate and construct a railroad from Portland to Astoria and McMinnville, or to accept a grant of lands conditioned upon the performance of such act. It is stipulated and agreed that the only provision in the articles of incorporation of the Oregon Central Railroad Company conferring the right and power to locate and construct a railroad, is as follows:

> "The object and business of the corporation shall be to construct and operate a railroad from the city of Portland through the Willamette valley to the southern boundary of the state, under the laws of Oregon and the law of congress recently passed granting lands in aid for such purpose." Record, p. 22.

It is obvious that under this authority the corporation has no power to construct and operate a road from the city of Portland, across the Willimette valley, to the northwestern corner of the state, or to accept a grant of lands to aid in doing those acts which are as to it *ultra vires*. The act of congress of May 4, 1870, does not purport to confer upon the corporation any authority which it did not have without that act, and we respectfully submit that the grant is void for want of a grantee to take.

The existence of a grantee authorized to take the grant is absolutely essential to every grant, and the grant to a fictitious person or corporation is a mere nullity, and can in no manner affect the title of the lands purported to be granted.

Thomas v. Wyatt, 31 Mo. 188.

Douthett v. Stinson, 63 Mo. 268.

U. S. v. S. C. C. & I. Co., 18 Fed. Rep. 273, 276.

Russell v. Topping, 5 McLean, 194, 202.

Harriman v. Southam, 10 Ind. 190.

Devlin on Deeds, § 191.

The Oregon Central Railroad Company, authorized to construct a road from the city of Portland through the Willamette valley to the southern boundary of the state, is the only corporation by that name of whose existence there is any evidence. Is it the corporation that is described in the act of congress? We submit that it is not. The act of congress grants lands "to the Oregon Central Railroad Company now engaged in constructing said road;" that is, a railroad and telegraph line from Portland to Astoria, and from a suitable point of junction near Forest Grove to the Yamhill river, near McMinnville, in the state of Oregon. It does not appear that the Oregon Central Railroad Company, which was authorized to build to the southern boundary of the state, was engaged in the construction of any such

railroad as the act of congress describes; and the presumption is, since such an act would be as to it *ultra vires*, that it was not engaged in that act. We submit that this being so, and it not appearing that there was any other corporation by the name of the Oregon Central Railroad Company, it does not appear that there was any corporation such as is described in the act of congress which could have taken the grant.

It further appears from the stipulation that the Oregon Central Railroad Company, which filed the acceptance to said grant, was the Oregon Central Railroad Company authorized to build to the southern boundary of the state. This company it is which filed a plat of the line of its road coterminous with this land, in the office of the secretary of the interior; but if this company was not the company indicated as the grantee in the act of congress, and, as stated, it does not appear that it was, the performance of this act by it, or the subsequent construction of the road by it, could give it no claim or title to these lands.

But if we concede that this was the corporation which congress intended to designate as the grantee under the act, we submit that it was without power to accept the grant, and that for that purpose it was not a corporation. It is settled that where it is doubtful whether a corporation has exceeded its powers or abused

its corporate franchise in the acquisition of title to land, strangers cannot litigate the question, at least after the title has vested. The question is one between the state and the corporation.

S. P. R. R. Co. v. *Orton*, 32 Fed. Rep. 457, 470.

C. S. M. Co. v. *V. & G. H. W. Co.*, 1 Saw. 470, 477.

Whitman M. Co. v. *Baker*, 3 Nev. 386, 371.

National Water Co. v. *Clarkin*, 14 Cal. 534, 554.

The Banks v. *Poitaux*, 3 Rand. 136, 141.

Leazure v. *Hillegas*, 7 Sarg. & R. 313.

Union Natl. Bank v. *Matthews*, 98 U. S. 621.

But while this is true, it is equally well settled that where the acquisition is prohibited, a grant to such corporation would be absolutely void and would not pass title.

Russell v. *Topping*, 5 McLean 194.

Harriman v. *Southam*, 16 Ind. 190.

Chautauqua Co. Bank v. *Risley*, 14 Denio 480.

Michigan Bank v. *Niles*, 1 Doug. 401.

People v. *Bank of Oakland Co.*, 4 Denio 280.

Every act of a corporation not affirmatively authorized by its charter involves an unauthorized exercise of its corporate powers, and a departure from the original agreement between the members of the company. The powers of a corporation are such, and such only, as are conferred, either expressly or by necessary impli-

cation; and the enumeration of certain powers impliedly prohibits all others.

Thomas v. Railroad Company, 101 U. S. 101.

Morawetz on Private Corporations, § 346 (2 ed.) and cases cited.

In the case at bar there is no doubt as to whether or not the Oregon Central Railroad Company was authorized to locate and construct its road from Portland to Astoria, or to accept a grant of lands to aid in the construction thereof. The question presented is not one of doubt as to whether or not it has exceeded its powers or abused its corporate franchises. The agreement between the members of the company, as evidenced by the charter, did not contemplate the building of a railroad from Portland to Astoria, and the company could not undertake such a task without a direct violation of that understanding between the members. The building of that railroad was never contemplated by the incorporators, and the right of the corporation so to do was prohibited, impliedly, it is true, but quite as emphatically as if a direct prohibition had been included in the articles. The case at bar, therefore, is not governed by those decisions where the question of the right of the corporation to take the lands is a question of doubt which the corporation has a right to have passed upon by the courts. Further, in the case at bar the question is not that of divesting from a corpor-

ation a vested title, but whether or not any title ever vested in the corporation. The grant was *in praesenti*, but the identification of the granted lands by the construction, or at least survey, of the road, was a condition precedent to the grant ever becoming operative for any purpose; and this condition precedent the grantee was incapacitated from performing, consequently no grant ever became effective, and there was nothing to prevent this land passing under the grant to the Northern Pacific.

See:

Case v. *Kelly*, 133 U. S. 515.
Colman v. *S. R. T. R. Co.*, 49 Cal. 522.
Russell v. *Topping*, 5 McLean, 194.
Harriman v. *Southam*, 16 Ind. 190.
Chautauqua Co. Bank v. *Risley*, 14 Denio 480.
Michigan Bank v. *Niles*, 1 Doug. 401.
People v. *Bank of Oakland Co.*, 4 Denio 280.
L. & N. R. R. Co. v. *Palmes*, 109 U. S. 255.

We submit that the case at bar must be controlled by the decision of this court in *Case* v. *Kelly*, 133 U. S. 515.

We respectfully submit that the decision of the court below should be affirmed.

JAMES MCNAUGHT,
FRED M. DUDLEY,
Attorneys for Defendant in Error.

DOLPH, MALLORY & SIMON,
Of Counsel.

And as conclusions from said facts, the court further finds:

(1.) That under the said act of congress approved July 2, 1864, the Northern Pacific Railroad Company was authorized to select, as the most eligible railroad route for its main line between Lake Superior and Puget Sound, lying within the territory of the United States and north of the 45th degree of north latitude, a route by way of the valley of the Columbia river, and thence northerly to Puget Sound; and that the authority given by said act to locate and construct a branch line via the valley of the Columbia river to a point at or near Portland, in the state of Oregon, is not a limitation on the rights of said company to locate and construct its main line via such valley, if it be determined upon by said company as the most eligible route.

(2. That the sixth section of said act approved July 2, 1864, forbade the sale, preemption or entry of the odd numbered sections of public land not reserved, sold granted or otherwise appropriated, and free from preemption or other claims or rights, within forty miles on each side of the line of general route, after the general, or preliminary, route shall be fixed, by filing a plat thereof in the

office of the commissioner of the general land office.

(3.) That the map of general route filed by said company in the office of the commissioner of the general land office, March 9, 1865, was so filed by said company in the legitimate exercise of its rights under the act approved July 2, 1864; and whether or not the lands for forty miles on each side thereof were by that act reserved from sale, pre-emption or entry except by the railroad company (a question not necessary to be here determined) it is conclusive that said railroad company had determined the route of its main line via the valley of the Columbia river to be the most eligible railroad route.

(4.) That the joint resolution of May 31, 1870, is a congressional approval, ratification and confirmation of said route as so selected, relating back to the date of the original act, July 2, 1864.

(5.) The grant, if any there was, made by the act of congress approved May 4, 1870, to the Oregon Central Railroad Company is subsequent in date to the grant to aid in the construction of that part of the Northern Pacific railroad extending from Kalama to Tacoma, made by said act approved July 2, 1864, and said joint resolution approved May 31, 1870; and no rights or claims in favor of said Oregon

Central Railroad Company attached to the odd-numbered sections for forty miles on each side of the line of definite location of the Northern Pacific railroad between Portland and Tacoma, which were otherwise public lands to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said Northern Pacific railroad was definitely fixed and a plat thereof filed in the office of the commissioner of the general land office, if, indeed, any rights or claims in favor of said Oregon Central Railroad Company ever attached to any lands in Washington Territory, or elsewhere.

6.) That by the filing of said second map of general route in the office of the commissioner of the general land office, to-wit, July 13, 1870, the general route of said road was fixed, even if not fixed prior thereto, and the odd numbered sections of non-mineral land, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, for forty miles on each side of said line, including said section three, township 8 north, of range 3 west, W.M., were from thenceforth reserved from sale, pre-emption or entry, for the benefit of said railroad company; and from and after said date no right or claim adverse to the Northern Pacific Railroad Company could attach to said land.

7. That by the filing of the map of definite location of that portion of said Northern Pacific Railroad opposite to and past said section 3, township 8 north, of range 3 west, W. M., in the office of the commissioner of the general land office, said section 3, was identified and determined to be one of the tracts of land granted to said railroad company July 2, 1864; and that said railroad company had held the legal title thereto since that date.

8. That by the construction and completion of said railroad and telegraph line opposite to and past said section 3, said railroad company acquired the fee title to said section, freed from all conditions and claims except the lien for survey fees.

9. That by said conveyances from said railroad company and Jay Cooke and Charlemayne Tower to J. S. Bennett and Patrick Baxter; and from said J. S. Bennett and wife and Patrick Baxter to James H. Newman; and from H. W. Fairweather, as administrator of the estate of said James H. Newman, deceased, to Jacob Weist and said E. Brock; and from said Jacob Weist and said E. Brock to B. F. Brock, the defendant herein, said title to the southeast quarter of section 3, township and range aforesaid, was, January 3, 1880, fully vested in said defendant. That at the date when the timber was cut upon said lands the title to said land

was ful'y vested in said defendant, B. F. Brock; and plaintiff was not the owner, and has not since been the owner of, or had any right, title, interest or estate in said land or timber thereon.

(10.) That the defendant is entitled to judgment. Let judgment be entered accordingly.

June 5th, 1893.

C. H. HANFORD,
Judge.

Office Supreme Court U. S.
FILED.
DEC 13 1893
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States,

October Term, 1893,

No. 135.

THE UNITED STATES OF AMERICA,

Plaintiff in Error,

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY, The Willamette Steam Mills Lumbering and Manufacturing Company, Julius Ordway, George W. Weidler, and Aaron Kinney,

Defendants in Error.

Extracts from Briefs filed on behalf of the United States, in the Circuit Court of the United States for the District of Oregon, in Case of United States vs. Oregon & California R. R. Co., *et al.*

JAMES McNAUGHT,

Counsel for Defendants in Error.

F. M. DUDLEY,

Of Counsel.

NEW YORK:
DOUGLAS TAYLOR & CO., LAW PRINTERS, 8 WARREN STREET.

1893

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vs.

THE NORTHERN PACIFIC RAILROAD COMPANY, The Willamette Steam Mills Lumbering and Manufacturing Company, Julius Ordway, George W. Weidler, and Aaron Kinney,
Defendants in Error.

We print herein and beg leave to file in this case extracts from briefs filed on behalf of the United States in the Circuit Court of the United States for the District of Oregon in case of United States *vs.* Oregon and California Railroad Company *et al.*, in which the constructions for which we are contending in this case were advocated by counsel for the United States and sustained by said Court.

We also beg leave to file in this case a copy of the decision rendered by Judge Gilbert in said case sustaining said constructions.

Respectfully submitted,
JAMES McNAUGHT.
Counsel for Defendants in Error.

F. M. DUDLEY,
Of Counsel.

Appendix "A."

IN THE CIRCUIT COURT OF THE UNITED STATES,

FOR THE DISTRICT OF OREGON.

THE UNITED STATES

vs.

OREGON & CALIFORNIA RAILROAD COMPANY *et al.*

Brief for the United States.

Mr. Payson, in his argument, page 11, states that the grant to the Northern Pacific Railroad Company by the Act of July 2, 1864, was a grant *in praesenti* upon condition subsequent. This is undoubtedly correct and, as it appears to me, is fatal to the claim of the railroad company. Section 2 of the act of July 25, 1866, granting lands to aid in the construction of the Oregon and California Railroad excepts from the operation of that grant such alternate sections or parts of sections as shall be found to have been "*granted*," sold, reserved, occupied by homestead settlers, pre-emption or otherwise disposed of; and therefore any lands that had been previously *granted* by the United States were excepted from the operation of that act.

Now, if the lands in question in 1864 were granted to the Northern Pacific Railroad Company, then they were never granted to the Oregon and California Railroad Company. It makes no difference whether the grant was an

absolute grant or a grant upon condition subsequent. All the lands theretofore granted, whatever the nature of the grant might be, were excepted from the granting clause of the act granting land to aid the Oregon and California Railroad.

* * * * *

It is admitted that the grant to the Northern Pacific was a grant *in præsenti*, and it has been frequently decided by the Supreme Court that when such a grant is made and the limits or sections of lands granted are ascertained, that the title takes effect by relation as of the date of the grant.

Wood *vs.* Burlington & Mo. River R.R. Co., 104 U. S., 329.

Van Wyck *vs.* Knevals, 106 U. S., 360.

St. Joseph & D. City R.R. Co. *vs.* Baldwin, 103 U. S., 426.

It has also been decided by the same Court that neither priority of location nor priority of construction gives priority of right where there is a conflict between the claims of different railroad companies, but that the rights of the respective companies are to be determined as of the dates of the acts making the grants.

M. K. & T. R.R. Co. *vs.* Kan. Pac. RR.. Co., 97 U. S., 491.

St. Paul & Sioux C. R.R. Co. *vs.* Winona & St. P. R.R. Co., 112 U. S., 720.

Sioux C. & St. P. R.R. Co. *vs.* C. M. & St. P. R.R. Co., 117 U. S., 406.

Another thing to be considered in this connection is this: Grants of land in aid of railroads are to receive such a construction as will carry out the intent of Congress, to

ascertain which intent the Court will look to the condition of the country as well as to the purpose declared and read all parts of the act together.

Winona & St. P. R.R. Co. *vs.* Barney, 113 U. S., 618.

I claim that in view of the fact that the act making a grant of land to the Northern Pacific Railroad Co. was passed in 1864, and the act making the grant of land to the Oregon & California Railroad Co. in 1866, and in view of the uninhabited and unsurveyed condition of a very large part of the country through which the line of the Northern Pacific must of necessity run, and in view of the length of the line of that road, that it was not the intention of Congress by the Act of 1866 to take away from the Northern Pacific Railroad Company any part of the land included within its grant as subsequently ascertained within a reasonable time and give it to another railroad company.

The Supreme Court of the United States has decided, by analogy, that the word "grant" in the Act of 1866, was not intended to embrace any lands that were granted to the Northern Pacific Railroad Company in the Act of 1864.

M. K. & T. R.R. Co. *vs.* Kan. Pac. R.R. Co., 97 U. S., 491.

* * * * *

The Perham Map.

I do not agree with the learned counsel for the railroad company or with Attorney-General Garland that the Perham Map, so far as the road by the way of the Columbia River to a point at or near Portland, Oregon, is concerned, was not a sufficient designation to entitle the N. P. R.R.

Co. to the lands adjacent thereto, as specified in said act of 1864; but agree with Judge Sawyer and hold that his opinion in the case of the U. S. *vs.* N. P. R.R. Co., 41 Fed. Rep., 842, is a correct exposition of the law.

I further submit that the agreed statement of facts in that case was in all material points correct with a single exception, namely, that the statement of facts sets forth that there was no action taken by the Interior Department upon the Perham map or the accompanying request. This is incorrect, for while it is true that the Perham map was not rejected by the Interior Department, it is true also that the accompanying request for the withdrawal of the lands along the route indicated on said map was rejected by Commissioner Wilson.

On March 6, 1865, the President of the N. P. R.R. Co. transmitted said map to the Secretary of the Interior, accompanied by a letter in which he stated:

"Under authority from the Board of Directors of the N. P. R.R. Co., I have designated on the accompanying map, in red ink, the general line of their railroad from a point on Lake Superior, in the State of Wisconsion, to a point on Puget Sound, in Washington Territory, *via* the Columbia River, adopted by said company as the line of its railroad, subject only to such variations as may be found necessary after more specific surveys."

Now, said map distinctly shows in red ink the general line of the railroad between the points designated which had been adopted by the N. P. R.R. Co., and I say that when that map was filed with the Secretary of the Interior the right of the company to have the lands of each side of the line so designated within the prescribed limits reserved from sale was perfected, and the officers of the Land Department had no power to destroy that right.

Sec. 1 of the act of 1864 authorized and empowers the N. P. R.R. Co. to "lay out, locate, construct, furnish,

maintain and enjoy a continuous railroad and telegraph line, with the appurtenances, namely, beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin, thence westerly *by the most eligible railroad route, as shall be determined by said company, within the territory of the United States, etc.*"

Now, the power to determine the route for the N. P. R.R. Co. was conferred upon the railroad company incorporated by said act of 1864, and when that corporation determined that the route should be as designated by the red line on the Perham map, I may say that the Secretary of the Interior had no power to say that this was not or should not be the route of the railroad, unless it was made to appear that there was some fraud or wrong perpetrated upon the government by the location of the road. The refusal of the Commissioner of the General Land Office to withdraw lands along the route designated on the Perham map amounts to nothing. The lands were withdrawn by operation of law when the route of the railroad company was fixed and the map thereof filed with the Secretary of the Interior.

I ask the attention of the Court to Section 6 of the Act of 1864, which provides: "That the President of the United States shall cause the land to be surveyed for 40 miles in width on both sides of the entire line of said road, after the general *route shall be fixed*, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption *before or after* they are surveyed, except by said company, as provided in this act."

Commenting upon this section, the Supreme Court of the U. S., in the case of the St. Paul, etc., R.R., Co. *vs.* N. P. R.R. Co., 139 U. S., 1, says: "They (referring to the lands granted to the N. P. R.R. Co.) were therefore

excepted by that legislation from grants, independently of the withdrawal by the Secretary of the Interior. His action in formally announcing their withdrawal was only giving publicity to what the law itself declared. The object of the withdrawal was to preserve the land unincumbered until the completion and acceptance of the road." Therefore, when the general route of the road was fixed, as it was by the Perham map, the lands along said road were to be surveyed and the odd sections of the land within forty miles of said route, as well before as after the surveys, were withdrawn from sale; so that the act of 1864 protected odd sections within forty miles of the general route after it was fixed for the N. P. R.R. Co.

I claim that, so far as the lands in question are concerned, the route of the N. P. R.R. Co. was definitely fixed by the act of 1864. That act provided that the branch, leaving the main trunk at the nearest suitable place, of the road should run through the valley of the Columbia River to a point at or near Portland, in the State of Oregon. Now, the valley of the Columbia River is known to be little more than a gorge through the mountains, with no considerable width on either side of the river, and the provision that the road should run through the valley of the Columbia River is about equivalent to saying that it should run along the bank of the Columbia River.

The Perham map locates the line through the valley of the Columbia River, immediately upon the bank of the river, and there was no other place where it could be located in compliance with the act; and the only difference between the line of the road down the Columbia to Portland, as located by the Perham map, and the line of the road, as located down the Columbia River, under the joint resolution of May 31, 1870, is that the line upon the Perham map is on the south bank of the Columbia River,

and the line under the resolution of 1870 is on the north bank of the same river; so that the two lines are not substantially different from each other.

(It will be observed by an examination of the maps that Mr. Williams is in error in this statement, as both maps, the one of 1865 and the one of 1870, locate the line on the north bank of the Columbia River.)

Whatever may be said about the Perham map as to other portions of the road there is no question, so far as the road down the Columbia River is concerned, that the map was perfectly clear from any ambiguity or uncertainty.

Another thing to be considered is that this line of road was to terminate at or near Portland by virtue of the Act of Congress. How could a road be constructed from a suitable place upon the line of the road from Lake Superior to Puget Sound down the Columbia River to Portland without including the lands in question? These lands all lie within forty miles of the City of Portland, and it would seem therefore that the act itself sufficiently designates the route of the road to entitle the company to these lands, and that the filing of a map was a mere matter of form to comply with the provisions of the act.

The Supreme Court, in the case of St. Paul R.R. Co. *vs.* N. P. R.R. Co., *supra*, says: "The general purpose of the act was accomplished if such reasonable portions of the route were located as would intelligently guide the officers of the land department with reference to the patents to be issued for lands intended for the company."

We submit, in view of the requirements of the act of 1864, that the road down the Columbia River should be located in the valley of the Columbia River, and that its terminus should be at or near the City of Portland, and in view of the line down the river, as indicated on the Perham map, that all the ends of the act in requiring the

fixing of the general route of the road were accomplished, so far as the road down the river was concerned, and that the government and all persons had all the notice that could reasonably be required or that was necessary that the road, if constructed, would run substantially upon the line indicated in said map.

Joint Resolution of Congress, May 31, 1870.

Counsel for the R.R. Co. labor very hard to make it appear that this resolution is not amendatory of the act of 1864; but their views upon this point are obviously erroneous. That joint resolution, after authorizing a mortgage to be given by the N. P. R.R. Co., further provides that said Co. "may locate and construct under the provisions, and with the privileges, *grants* and duties provided for *in the act of incorporation*, its main road to some point on Puget Sound *via* the Columbia River, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound."

What does this resolution mean when it refers *to this "act of incorporation?"* When it speaks of "grants," to what grants does it refer excepting *grants* provided for in the act of 1864? All that this joint resolution does is to amend the act of 1864 by providing for the mortgage of the road and for making the line down the Columbia River the main line instead of the branch line, and further providing that the road may go ten miles beyond the limits prescribed in the act of 1864 to make up deficiencies for the lack of lands within the original limits of the grant; otherwise the act of 1864 remains in full force and effect.

Sec. 6 of said Act of 1864, heretofore quoted, is not disturbed by this joint resolution of 1870.

On the 13th of August, 1870, it appears that another map indicating the route of the N. P R.R. Co. was filed with

the Secretary of the Interior, and, whatever may be said about the Perham map, there can be no reasonable pretence that this map, so far as the route of the R.R. down the Columbia River is concerned, is to all intents and purposes a definite location of said road. The line of the road down the Columbia River on this map is located on the north bank of the Columbia, while that of the Perham map is located on the south bank of the Columbia; so that the two routes are generally separated by the width of the river.

Assuming that I am mistaken in all that I have said as to the Perham map, I contend that when this map of 1870 was filed, * * * it took effect by relation at the date of the Act of 1864, so as to cut off the claim of the O. & C. R.R. Co. I mean to say that the grant to the N. P. R.R. Co., if inchoate up to that time, was perfected by the filing of this map so that the exception from the Act of 1864 of the lands *granted* would be rendered certain by the filing of this map.

I have spoken of the line of the railroad down the Columbia River as perhaps distinguishable from other portions of the line of said road on account of the greater certainty of its location, and that portion of the road along the river may be considered without reference to other portions of the road; and I think this idea is supported by the Supreme Court in St. Paul, etc., R.R. Co. *vs.* N. P. R.R. Co., when it says: "The contemplated railroad from Lake Superior to Puget Sound was about 2,000 miles in length, and it was not expected that there should be a general designation of the whole route over this distance before any land should be withdrawn or any rights of the company should attach."

* * * * * *

Touching the point made by counsel for the defense that the N. P. R.R. Co. had no right to locate its main line

down the Columbia River, I have to say that Judge Sawyer, in his opinion in the case of the U. S. *vs.* N. P. R.R. Co., 41 Fed. Rep., 842, clearly shows that the N. P. R.R. Co. had the right before the joint resolution of 1870 to locate its main line by way of the valley of the Columbia River.

When the act was passed, and for many years afterwards, it is well known that it was doubtful whether a practicable pass for a railroad through the mountains could be found from the Upper Columbia to Puget Sound; and if no such pass had been found it is clear that the company would have the right to run its road down the Columbia River in order to reach Puget Sound, if that was considered the most eligible route.

* * * * *

It appears to me that the point made by the counsel for the defense that the act of Congress of July 2, 1864, made no grant for the road by way of the valley of the Columbia River to a point at or near Portland is so clearly untenable that no argument is necessary to answer it.

* * * * * * *

Again, the question in this case is this: Were the lands in question *so granted* by the act of 1864 to the N. P. R.R. Co., in view of the subsequent acts of that company in filing its maps, *as to be excepted* from the grant to the O. & C. R.R. Co., which provides that lands theretofore *granted* shall be excepted from the grant to said O. & C. R.R. Co.

Quoting from the case of Buttz *vs.* N. P. R.R. Co., 119 U. S., 55, the Supreme Court, in the case of U. S. *vs.* So. P. R.R. Co., 146 U. S., says: "The general route may be considered as fixed when its general course and direction are determined after an actual examination of the country or from a knowledge of it, and is designated by a line on a map showing the general features of the

adjacent country and the places through or by which it will pass. The officers of the Land Department are expected to exercise supervision over the matter, so as to require good faith on the part of the company in designating the general route, and not to accept an arbitrary and capricious selection of the line irrespective of the character of the country through which the road is to be constructed. *When the general route of the road is thus fixed in good faith, and information thereof given to the Land Dept. by filing the map thereof with the Commissioner of the General Land Office or the Secretary of the Interior, the law withdraws from sale or pre-emption the odd sections to the extent of forty miles on each side. The object of the law in this particular is plain; it is to preserve the land for the company to which, in aid of the construction of the road, it is granted.*

* * * * *

Respectfully submitted,
WILLIAMS & WOOD.

GEO. H. WILLIAMS,
Of Counsel.

The following appendix, "B," contains extracts from the brief used by the United States Attorney for the District of Oregon, on the argument of said case.

Appendix "B."

IN THE CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF OREGON.

THE UNITED STATES OF AMERICA,
Complainant,

vs.

O. & C. R. R. Co., JOHN A. HURLBURT and THOMAS L. EVANS,
Defendants.

Brief for Complainant on Demurrer to the Bill.

This suit was brought by the United States to set aside and cancel certain patents issued by the Government to the O. &. C. R.R. Co., under the provisions of an "Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad, in California, to Portland, Oregon, approved July 25th, 1866."

The bill, after setting out the Act of Congress of July 2, 1864, and the subsequent acts and resolutions of Congress in relation thereto, also the above act of July 5, 1866, alleges that these patents were issued under said act of July 25, 1866, and

"But your orator avers that the ministerial officers of your orator acted erroneously and contrary to law in issuing the patents of the lands described in under the

facts as stated herein, and so your orator avers that said patents are void and should be so declared, but said company still claims title to said lands under said patents and withholds said lands from your orator."

The point in dispute between the United States, complainant, and the Oregon & California R.R. Co. is as to when the title granted by the Act of July 2, 1864, vested in the Northern Pacific R.R. Co., and whether or not, at the time of the passage of the Act of July, 1866, granting lands to the Or. & Cal. R.R. Co., the government had any title or interest in the lands in controversy in this suit which it could, by patent or otherwise, convey to the Or. & Cal. R.R. Co., or to any person or corporation other than the Northern Pac. R.R. Co.

The question as to what title the Northern Pacific R. R. Co. took under the act of July 2, 1864, and when it vested has been twice before presented in this Court; first, in the case of

Denny *vs.* Dodson, 32 Fed. Rep., p. 903.

Justice Field, speaking for the Court and having this point under consideration, uses the following language:

"The terms in which the land is granted do not support the contention of the defendant. They import the transfer of a present title, and not one to arise in the future. They are 'that there be and hereby is granted' to the Company every alternate section of the lands designated. There is nothing in them to indicate that only a partial or limited is intended. The lands themselves, described by the sections named, are granted; and, of course, whatever interest the United States possessed in such lands passed, unless the import of the terms be qualified by subsequent provision of the act; and whether such is the case we shall presently consider. Similar terms are employed in a large number of congressional grants of lands, and

notably so in those made to aid in the construction of railroads. They have been considered by the Supreme Court in many instances, and in all of them have received the same interpretation; which is, that unless restricted by other clauses of the act they import a grant *in præsenti* conveying at once the interest of the United States to the lands described, whatever that may be.

"As the sections granted are to be along the line of the railroad, they cannot be located until the line of the road is fixed. The grant, therefore, is in the nature of a float; and the title does not become definitely attached to specific sections until they are capable of identification. But when they are once identified, the title attaches as of the date of the grant, except as to such parcels as in the meantime by the terms of the act have been otherwise appropriated. It is in this sense that the grant is termed a grant *in præsenti*. * * * "The present title here mentioned is a legal title, as distinguished from an equitable or inchoate interest arising upon a contract or promise of the government. The words, 'there be and is hereby granted' are not words of contract or promise, but, as said in the citation, are words of absolute donation; that is, they transfer a present legal right to the sections designated, which becomes attached to them specifically whenever they are identified." * * * "But, in advance of the construction of the road and telegraph line, or of particular portions, the lands could not be used without the permission of Congress, so as to cut off the rights of the United States mentioned above. Such permission was given when, on the 31st of May, 1870, by the joint resolution of the two houses, Congress authorized the company to issue its bonds to aid in the construction and equipment of its road, and to secure the same by mortgage on its property and rights of property of all kinds and descriptions, real, personal and mixed, including its franchises as

a corporation. In the property mentioned the lands granted to the company are included. It can hardly be supposed that Congress would have allowed this mortgage if the company had no legal title to the lands which could be held as security for the moneys advanced on the bonds and transferred by sale upon foreclosure, in case default should be made in their payment. To suppose that Congress would sanction such a proceeding would be to impute to it complicity in a fraud, which cannot be entertained for a moment. The conclusion follows that it allowed the execution of the mortgage, because it had transferred to the company a title to the lands covered by its grant, which could in this way be made available to raise funds for the work."

In the case of the United States *vs.* N. P. R.R. Co., decided in this Court and reported in

41 Fed. Rep. p. 845,

Judge Sawyer having under discussion the effect of the Act of Congress of July 2, 1864, and the question as to when the title to the lands in controversy vested in the N. P. R.R. Co. and which was under the grant of July 2, 1864, uses this language: "And Congress itself, in its resolution of May 31, 1870, before any location by the Oregon Central R.R. Co., 16 St., 378, recognized and approved this location of the main line as having been properly made, after it had been adopted by the company, that resolution 'authorizing the No. P. R.R. Co. to issue its bonds for the construction of its road and to secure the same by mortgage and for other purposes.' This resolution, in addition to empowering the company to issue and mortgage its land, also authorized it 'to locate and construct under the provisions and with the privileges, grants and duties provided for in its act of incorporation (the said act of 1864) its main road to Puget Sound via the Columbia River, with the right to locate and

construct its branch from some convenient point on its main trunk line across the Cascade Mountains.' Could there be a plainer recognition and approval of the location of the main line down the Columbia River as having been properly made under the provision of the incorporation act? This is a legislative construction of the act, corresponding to that given to it by the corporation. At all events it confirms the locations, and the confirmation relates back to the date of the location and even to the date of the act. I feel no hesitation in saying that the location was legally and properly made under the act, and if not that this resolution confirms it. The grant, then, dates from July 2d, 1864. The first map of general location of this portion of the line was filed in the Interior Department in March, 1865. True, the Secretary of the Interior Department did not, on this occasion, give notice of a withdrawal of the lands from pre-emption sale, &c. But then the statute did not require him to do so. But Section 6 provides that the 'President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed and as fast as may be required by the construction of said railroad, and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption before or after they are surveyed, except by said company, as provided in this act.' Thus the act itself withdrew the lands upon the filing of the map of 'after the general route shall have been fixed,' which was done by filing the map of the route selected. The company, by filing the map, had indicated the line and the grant, before uncertain, now became certain, and attached to the odd sections of the land within the 40-mile limit. No notice was required to be given by the Secretary. Buttz *vs.* R.R. Co., 119 U. S., 55; 7 Sup. Ct. Rep., 100; Denny *vs.* Dodson, 13 Saw., 84; 32 Fed. Rep.,

899. But if notice had been provided for, the failure of the Secretary to act would not have affected the rights of the company after it had performed its part. The neglect of the Secretary of the Interior would not impair the company's rights. Van Wyck *vs.* Knevals, 106 U. S., 366; 1 Sup. Ct. Rep., 366. And in this case, as we have seen, 'after the general route shall be fixed,' the odd sections are not liable to grant to any other party, and the general route was fixed within the meaning of the act on the filing of the map in March, 1865. Another map, designating the same line, was filed August 13th, 1870, upon which upon the same day the Secretary of the Interior formally withdrew the lands, and issued his notice and the road was actually constructed and completed on this line in the years 1871–2 and '3. The title, therefore, became indefeasable, the conditions subsequent as this part of the line having been fully performed."

* * * * * *

These authorities show that the grant made by Congress to the N. P. R.R. Co. by the act of July 2d, 1864, was a grant *in præsenti*, that it took effect, as the authorities show, in the nature of a float and became susceptible of identification whenever the line of continuous route was fixed by the company. We find no support for the contention that there was any contemplation of Congress to impose upon the N. P. R.R. the duty of filing two maps with the Commissioner of the General Land Office. Counsel will contend in this case that it is necessary not only to file a map of continuous route, that is, a map showing the line of road as agreed upon by the company, but that it was also incumbent on the company to file another map called a map of definite location. We find no provision in the act providing for any such map, nor could it ever be filed until after the road was entirely completed if the contention of counsel is correct. It was contemplated by

Congress that the N. P. R.R. Co. should file such map as would preclude them from varying the line of their road within the limits provided by the grant. When the map of 1864, known as the Perham map, Exhibit "C" in this case, was filed, the company, in our judgment, did all that was required of it by the act of July 2d, 1864. Certainly, if this is not correct, then when the two maps of Aug. 13th, 1870, identified herein as Exhibit "A," were filed, nothing remained to be done by the company to identify its grant and to withdraw the lands from further conveyance by the government. Both these maps show a line of continuous route from the eastern terminus of the Wallula, from Wallula to Portland, and thence to the Sound. The line actually constructed as far as Wallula is almost exactly the same as the line shown on these maps.

That Congress considered that the company had complied with the conditions subsequent attached to the grant as to filing a map with the Commissioner of the General Land Office is sufficiently evidenced by the passage of the resolution approved May 31st, 1870, wherein Congress authorizes the N. P. R.R. to build its main route by the valley of the Columbia from Wallula to Portland and thence to the Sound, instead of a line right over the mountains from Wallula and a branch from Portland. That resolution also authorizes the company to issue its bonds to aid in the construction and equipment of its road and to secure the same by mortgage on its property and rights of property of all kinds and description. This resolution fully authorized the N. P. R.R. Co. to mortgage all these lands, and could not have been possible were it not that Congress considered that the company had, up to that time, complied with all the conditions attached to this grant and were entitled to mortgage the lands. Certainly, no title after that could have remained in the government which it could convey to a railroad company or to any

person. To hold that it still retained a title would be to say that it was a party to a connived fraud by the N. P. R.R. Co.; that this resolution of May 31st, 1870, was intended to enable the N. P. R.R. Co. to perpetrate a fraud, there being still a title sufficient to impeach the grant.

* * * * *

In any view of this case it seems to us that the grant of July 2d, 1864, being one *in præsenti*, transferred the legal title to the N. P. R.R. Co., subject only to be defeated by the lack of performance on the part of said company of condition subsequent until forfeiture by the Government. By the grant no title remained in the Government which it could transfer to the Or. & Cal. R.R. Co., or to any one. The patents then, herein complained of, issued to the Or. & Cal. R.R. Co., were erroneously issued and should be cancelled.

IN THE

CIRCUIT COURT OF THE UNITED STATES

FOR THE

DISTRICT OF OREGON.

UNITED STATES v. OREGON & C. R. CO. et al.

(Circuit Court, D. Oregon. September 8, 1893.)

No. 1,082.

1. PUBLIC LANDS—RAILROAD GRANT—NORTHERN PACIFIC—EXTENT OF GRANT.
Act of July 2, 1864, (13 Stat. 365,) which authorized the construction of the Northern Pacific Railroad from Lake Superior westerly to some point on Puget sound, with a branch via the valley of the Columbia river to a point at or near Portland, Or., granted lands in aid of the construction on each side of "said railroad line." *Held*, that the grant extended to the road with its branch, and not merely to the main trunk line.

2. SAME—RESERVATION OF "GRANTED" LANDS.
The grant to the Northern Pacific Railroad was of "every alternate section of public land, not reserved, sold, granted * * * at the time the line of road is definitely fixed and a plat thereof filed in the office of the commissioner of the general land office." *Held*, that the reservation of "granted" lands was not made in contemplation of a subsequent grant of the same lands to the Oregon & California Railroad.

3. SAME—GRANT IN PRÆSENTI.
The grant of land to the Northern Pacific Railroad conveyed a present title, subject to the right of the United States to re-enter on failure of the railroad to comply with conditions subsequent, and made the land so conveyed "granted" land, within the operation of the subsequent grant to the Oregon & California Railroad, which also reserved "granted" land.

4. SAME—PRIORITY OF GRANT.
The grant of lands to the Oregon & California Railroad did not gain a priority over the grant to the Northern Pacific Railroad, either by the fact that the Oregon & California Railroad filed its map of definite location, constructed a portion of its road, and received patents for the land, before the maps of the line of the Northern Pacific Railroad, showing the conflict of grants, were filed, or by the fact that no portion of the Northern Pacific was finally constructed on the line of such maps.

In Equity. Suit by the United States against the Oregon & California Railroad Company, John A. Hurlburt, and Thomas L. Evans to cancel patents, and restore land to the public domain. Defendants demur. Demurrer overruled.

From the Federal Reporter, vol. 57.

Daniel R. Murphy and John M. Gearin, for the United States.
W. D. Fenton and L. E. Payson, for defendants.

GILBERT, Circuit Judge. By act of congress of July 25, 1866, a grant of lands was made to the Oregon & California Railroad Company to aid in the construction of a line of railroad within the state of Oregon, beginning at Portland, and running thence to the southern boundary of the state; thence to connect with a proposed line of railroad in California running from the state line to a point of connection with the Central Pacific Railroad, in the Sacramento valley. The grant was made in the usual form, and covered every alternate section of public land, not mineral, designated by odd sections, to the amount of 10 sections per mile on either side of the line, reserving therefrom lands granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, for which lands indemnity was to be allowed as provided in the act. Under the provisions of this act the beneficiary filed its map of definite location for a distance of 60 miles south of Portland on October 29, 1869, and upon January 31, 1870, the lands within the grant for that distance were by the secretary of the interior withdrawn from settlement. A portion of the road was thereupon constructed, and commissioners were appointed to examine and report thereon. On December 31, 1869, the commissioners reported that the road had been duly built for the first 20 miles south from Portland. On September 28, 1870, the commissioners reported the due construction of the next 20 miles. Both these reports were approved by the president, and patents for the lands coterminous with the completed road were issued to the Oregon & California Railroad Company, of dates May 9, 1871, July 12, 1871, June 22, 1876, and June 18, 1877.

The United States brings this suit to cancel said patents, and to restore said lands to the public domain, upon the ground that the lands were not within the grant to said railroad company, and said patents were erroneously issued. There is involved in the suit, approximately, 100,000 acres of patented lands, and 120,000 not patented. The merits of the controversy are presented upon a demurrer to the bill. It is the contention of the United States that the lands were the subject of a grant to the Northern Pacific Railroad Company prior in date to the grant to the Oregon & California Railroad Company, and that, therefore, they were not included in the grant to the latter company, but were, upon the other hand, expressly excluded therefrom by the words of reservation, whereby prior "granted" lands were taken out of the operation of the later grant.

On the 2d day of July, 1864, by act of congress, the Northern Pacific Railroad Company was incorporated. 13 Stat. 365. A portion of section 1, and sections 2, 3, and 6 provide as follows:

"And said corporation is hereby authorized and empowered to lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph line with the appurtenances namely, beginning at a point on Lake Superior in the state of Minnesota or Wisconsin; thence westerly by the most eligible railroad route as shall be determined by said company, within the territory

of the United States, on a line north of the forty-fifth degree of latitude, to some point on Puget sound, with a branch via the valley of the Columbia river to a point at or near Portland in the state of Oregon, leaving the main trunk line at the most suitable place, not more than three hundred miles from its western terminus. Sec. 2. And be it further enacted that the right-of-way through the public lands be and the same is hereby granted to said Northern Pacific Railroad Company, its successors and assigns, for the construction of a railroad and telegraph as proposed; and the right, power and authority is hereby given to said corporation to take from the public lands adjacent to the line of said road, material of earth, stone, timber, etc., for the construction thereof. Said way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad, where it may pass through the public domain, including all the necessary ground for station buildings, workshops, depots, machine shops, switches, side tracks, turntables, and water stations, and the right-of-way shall be exempt from taxation within the territories of the United States. The United States shall extinguish as rapidly as may be consistent with public policy and the welfare of the said Indians, the Indian titles to all lands falling under the operation of this act, and acquired in the donation to the road named in this bill. Sec. 3. And be it further enacted, that there be and hereby is granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast and to secure a safe and speedy transportation of the mails, troops, munitions of war and public stores over the route of said line of railway every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line as said company may adopt through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office; and whenever prior to said time any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof under the direction of the secretary of the interior in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections; provided that if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act," etc.

Section 6 provides that the president of the United States shall cause the lands to be surveyed for 40 miles in width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad, etc.

The defendants raise a question of construction of this act, which, if well taken, disposes of the controversy at the outset. They urge that the grant is to be strictly construed against the grantees therein named, and that by the terms thereof land is granted only in aid of the construction of the main line of the Northern Pacific, and not in aid of the branch line by way of the Columbia River valley to Portland. I do not so construe the language of the grant. The act authorized the company to build and operate a continuous road, "beginning at Lake Superior and running thence westerly to some point on Puget sound, with a branch line via the Columbia River valley to Portland." It then granted to the com-

pany permission to take material for the construction of "said road" from the public lands adjacent thereto, and gave a right of way upon public lands 200 feet "on each side of said railroad." It granted lands in aid of the construction, and the grant extends to lands on each side of "said railroad line," and makes the further provision that as soon as the general route is fixed the president shall cause the granted lands to be surveyed for 40 miles on both sides of "the entire line." Throughout the act the reference is to the road with its branch, as a single line or road. In the words of the act the grant of land is coextensive with the grant of right of way and the grant of other privileges. There is as much reason for confining the grant of way to the main trunk line as for confining the grant of subsidy to that portion of the road. The road with its branch is referred to as one road in the act, and we have no warrant for saying it is not properly so described.

In view of the subsequent action of the company, however, it becomes immaterial whether or not there was a grant in aid of the branch line. Under the terms of the act the company had the power to locate the main line by the valley of the Columbia river if it so chose, and, as will be seen, that route was subsequently selected, and maps were filed in accordance therewith, and, whatever rights the Northern Pacific Company acquired to the definite sections of land involved in this suit, it obtained by reason of so locating its main line. These lands being included in the general terms of the grant in aid of the construction of the Northern Pacific Railroad, it is obvious that they were excluded from the operation of the grant to the Oregon & California Company, unless (1) they are within the reservation contained in the grant to the Northern Pacific Company; or (2) the failure of that company to construct its road via the Columbia River valley, and to comply with the condition subsequent upon which the grant was made, operated to take the lands out of the reservation contained in the grant to the Oregon & California Company, whereby all "granted" lands were excepted therefrom.

It is urged by the defendants that the reservation contained in the grant to the Northern Pacific Railroad Company expressly excludes from that grant the lands in question in this suit. That grant was of "every alternate section of public land," etc., "not reserved, sold, granted," etc., "at the time the line of said road is definitely fixed and a plat thereof filed in the office of the commissioner of the general land office; and whenever prior to said time any of said sections or parts of sections shall have been granted * * * or otherwise disposed of, other lands shall be selected by said company in lieu thereof." The argument is that, inasmuch as prior to time of fixing the definite line of the Northern Pacific Railroad a grant of the same lands was made to the Oregon & California Company, the lands fall within the description of "granted" lands, which are expressly excepted from the operation of the prior grant. In other words, while the lands in controversy were not "granted" lands at the time of the grant to the Northern Pacific Company, so as to be excluded from the lands conferred

upon that company at that time, yet, within the time limited thereafter in which that company could establish its right thereto, they were withdrawn from that grant by the act of congress whereby they were bestowed upon another company, and that the contingency of such withdrawal and subsequent disposal was contemplated and provided for in the prior grant when the exception of granted lands was incorporated therein.

It is urged that there was no law to prohibit a second conditional grant of the same lands in aid of a second railroad before anything should have been done by the first company, and with the understanding that whatever should be taken by the second company should be in subordination to the rights of the first company. It may be conceded that the power of congress in this direction was plenary. But the question here is not what congress had the power to do. It is, what did congress do? What was the intention of congress in inserting the reservation of granted lands from the operation of the first grant? In the light afforded by the policy of the government in relation to the disposition of the public lands in aid of railroad construction, and in view of the settled doctrine of the courts in relation to the nature of the title which passes under such grants, it would seem that the reservation of "granted" lands was not made in contemplation of a subsequent bestowal of the lands in aid of another road. Under such a construction the object of the first grant would be liable to be wholly defeated by a second grant, and the beneficiary of any railroad grant, while complying strictly with the conditions imposed thereupon, might be deprived of the aid upon which the construction of its road depended.

In Missouri, etc., Ry. Co. v. Kansas Pac. Ry. Co., 97 U. S. 498, the reservation in the first grant was of lands which were not "sold, reserved or otherwise disposed of by the United States and to which a pre-emption or homestead claim had not attached at the time the line was definitely fixed." The court in construing the grant, speaking by Mr. Justice Field, said:

> "As the sections mentioned could only be known when the route of the road was established, which might not be for years, the government did not intend to withhold the lands in the mean time from occupation and sale, and thus retard the settlement of the country, nor to exclude the land from appropriation for public uses. And the object of the reservation was to protect the acquisition of rights in this way to lands falling within the limits of the grant, and to exclude from its operation lands specially reserved and lands of a special character, such as mineral lands, other than those of iron or coal, the sale of which was seldom permitted anywhere, and swamp lands. The grant made was in the nature of a float, and the reservations excluded only specific tracts to which certain interests had attached before the grant had become definite, or which had been specially withheld from sale for public uses, and tracts having a peculiar character, such as swamp lands or mineral lands, the sale of which was then against the general policy of the government. It was not within its language or purpose to except from its operation any portion of the designated lands for the purpose of aiding in the construction of other roads."

In the recent case of St. Paul & P. R. Co. v. Northern Pac. R. Co., 139 U. S. 17, 11 Sup. Ct. Rep. 389, the court said:

"We are of opinion that the exception in the act making the grant to the Northern Pacific Railroad Company was not intended to cover other grants for the construction of roads of a similar character, for this would be to embody a provision which would often be repugnant to and defeat the grant itself."

But the grant to the Oregon & California Railroad Company contained a like reservation of "granted" lands, and it is next to be considered whether the lands in controversy were so affected by the grant to the Northern Pacific Company that at the time the grant to the Oregon & California Company took effect they were "granted" lands, and were therefore not within the operation of the latter grant. The nature of the grant itself, and the title that passed thereunder, is well settled by numerous adjudications. In St. Paul & P. R. Co. v. Northern Pac. R. Co., 139 U. S. 5, 11 Sup. Ct. Rep. 389, Mr. Justice Field said, speaking for the court:

"As seen by the terms of the third section of the act, the grant is one in presenti; that is, it purports to pass a present title to the lands designated by alternate sections. * * * The language of the statute is that 'there be and hereby is granted' to the company every alternate section of lands designated, which implies that the property itself passed not any special or limited interest in it. The words of grant import a transfer of a present title, not a promise to transfer one in the future. The route not being at the time determined, the grant was in the nature of a float, and the title did not attach to any specific sections until they were capable of identification, but when once identified the title attached to them, as of the date of the grant, except as to such sections as were specifically reserved."

The grant therefore conveyed a present title subject to be defeated upon a failure to comply with the conditions subsequent, but the right of reentry was vested only in the grantor, the United States. The United States alone could declare a forfeiture.

The Northern Pacific road was never constructed via the Columbia River valley, or coterminous with these lands. On March 6, 1865, a map known as the "Perham Map," and intended by the company as a map of general route of the road, was forwarded to the secretary of the interior by the president of the company, together with a letter, in which the president said:

"Under authority of the board of directors of the Northern Pacific Railroad Company, I have designated on the accompanying map, in red ink, the general line of this railroad from a point on Lake Superior, in the state of Wisconsin, to a point on Puget sound, in Washington Territory, via the Columbia river, adopted by said company as the line of its railroad, subject only to such variations as may be found necessary after more specific surveys," and requested that "the lands granted to the company be withdrawn from sale in conformity with law."

The map was drawn in the manner indicated in the president's letter. The line intended for the main line followed the north bank of the Columbia river to a point at or near Portland, and thence to Tacoma, on Puget sound, where it was met by the branch line which crossed the Cascade mountains. The map was disapproved by the commissioner of the general land office, and his disapproval was affirmed by the secretary of the interior. The question of the effect of this map was before this court for adjudication on March 1, 1890, in the case of U. S. v. Northern Pac. R. Co., 41 Fed. Rep. 842; and it was held by Judge Sawyer that the company had the

right, under the act of July 2, 1864, to locate its main line by way of the Columbia river through Portland, and that the Perham map was a map of general location, and that the failure of the secretary of the interior to give notice thereupon of the withdrawal of the lands from pre-emption, sale, etc., could not affect the rights of the company, for the act itself withdrew the lands upon the filing of the map, or, as expressed in the act, "after the general route shall have been fixed," which was done by filing the map of the route selected. The court said:

"The company, by filing the map, had indicated its line, and the grant, before uncertain, now became certain and attached to the odd sections of the land within the 40-mile limit. No notice was required to be given by the secretary;" citing Buttz v. Railroad Co., 119 U. S. 55, 7 Sup. Ct. Rep. 100.

It is urged that the decision loses its force as a precedent from the fact that the rejection of the Perham map by the commissioner of the land office and by the secretary of the interior was not brought to the attention of the court. It appears that the facts in regard to the Perham map were in that case agreed upon by the stipulation of the parties to the suit. It was stipulated that the map showed "the preliminary location of the company's railroad line from a point on Puget sound," etc., and that "no action was taken by the interior department upon the map, or the request accompanying it." I am unable to perceive how the action of the officers of the department could have affected the question that was then before the court. The matter under consideration was the action of the Northern Pacific Railroad Company, not what was done by the officers of the general land office. Their action could not affect the question that was then before the court, or the question that is now presented in this case.

The inquiry is whether or not the Northern Pacific Company fixed the line of its general route as early as March 6, 1865, by making and filing the Perham map. That the map, when filed, was unsatisfactory to the officers of the government, or was disapproved by them, is a matter foreign to the question. Whether or not it was a map sufficient for the purpose indicated must be determined by recourse to the map itself. The inquiry is not aided by reference to the action of the officers of the interior department. They were not clothed with power to prejudice the rights of the company. But, when their action is further considered, it appears that the extent of their disapproval was their refusal to withdraw the adjacent lands from settlement. This could not prevent the withdrawal, for, as said in the decision just quoted, the law itself made the withdrawal. The commissioner said:

"The evidence required of the route, under the established ruling of the department, is a connected map showing the exact location; the map indicating by flagstaffs the progress of the survey. * * * That proof is required to show the precise portions of each section or smallest legal subdivision cut by the road. * * * Now, in this view, the commissioner reports that no withdrawal should be ordered until the map of actual survey, authenticated as indicated, shall be filed in the district and general land offices."

It will thus be seen that in the estimation of the officers of the general land office the Perham map was insufficient, because it was

not a map of the final and definite location of a surveyed road, and because it had not also been filed by the company in the district land offices in which the lands were situate, neither of which is required by the act.

In construing this act in Buttz v. Railway Co., 119 U. S. 55, 7 Sup. Ct. Rep. 100, Mr. Justice Field said:

"The general route may be considered as fixed when its general course and direction are determined after an actual examination of the country, or from a knowledge of it, and is designated by a line on a map showing the general features of the adjacent country, and the places through or by which it will pass. * * * When the general route of the road is thus fixed in good faith, and information thereof given to the land department by filing the map thereof with the commissioner of the general land office, or the secretary of the interior, the law withdraws from sale or pre-emption the odd sections, to the extent of forty miles on each side."

It is contended further that the grant to the Northern Pacific Company of July 2, 1864, is wholly superseded and canceled by the joint resolution of congress of May 31, 1870, (16 Stat. 378,) and that whatever rights that company has in the public lands it takes from the latter date, having accepted the grant contained in the joint resolution in lieu of the earlier grant. I do not so understand the joint resolution. It begins with a recognition of the incorporation of the company under the prior act. It proceeds to confer upon the company power to mortgage its property. It expressly authorizes the company to make the change in its line by constructing the main line down the valley of the Columbia river, with power to build a branch line across the Cascade mountains, as indicated in the Perham map. It recognizes the existence and perpetuation of the prior land grant by providing for the substitution of other lands "in the event of there not being in any state or territory in which said main line or branch may be located, at the time of the final location thereof, the amount of lands granted by congress to said company within the limits prescribed by its charts." There is in the joint resolution other recognition of the "grants and duties" provided for in the act of incorporation, and nothing can be found indicative of a purpose to abrogate the prior act, or to substitute a new and independent grant therefor.

On the 17th day of August, 1870, the company filed a second map, designating the main line by way of the north bank of the Columbia river, as in the Perham map. It was a map of definite location, and thereupon the secretary of the interior formally withdrew the lands, and issued his notice. Whatever objection may be urged to the Perham map, it must be conceded that the map of August 13, 1870, in all respects, complied with the act, and that then, if not before, the line of the Northern Pacific road became definite and fixed. In the view I take of the law, it would make no difference with the rights of the parties to this suit if the Perham map had not been filed. The grant to the Northern Pacific being prior in date to the grant to the Oregon & California, and the reservation of granted lands from the first grant being held not to refer to lands subsequently granted in aid of another road, the first grant remained prior and superior to the second, and there could be no re-

versal of the order of their priority, resulting either from the fact that the grantee, under the junior grant, filed its map of definite location, and constructed a portion of its road, before any map was filed of the line of road under the older grant, or from the further fact that in the final construction of the Northern Pacific road no portion thereof was established upon the line either of the Perham map or the map of 1870. Congress did not offer these lands to the competition of the two companies, and it was not the intention that the more diligent of the two corporations should secure them.

I hold that the failure of the Northern Pacific to construct its road by way of the Columbia River valley, the forfeiture of its grant therefor declared by congress in 1890, and the construction by the Oregon & California Company of its road in apt time under its grant of July, 1866, are all matters foreign to the question under consideration. The fact remains that the lands in controversy were granted lands at the time the grant to the Oregon & California Company took effect. They were, therefore, not the subject of the grant to that company. When that grant was made the beneficiary thereof had full notice of the prior grant, and had reason to understand that the lands so devoted to aid the construction of the other road were not within the purview of its own grant, and were not promised it by the United States. Under these circumstances it cannot be justly said, as urged by counsel for the defendants, that the United States is now placed in the attitude of breaking faith with the Oregon & California Company. That patents were issued to the defendant company for these lands does not affect the decision of this case upon the demurrer. The public lands of the United States are held in trust for the people, and cannot be disposed of by the unauthorized acts of the agents or officers of the government. The demurrer to the bill must be overruled.